
BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Gains And Shortcomings In Resolving Regulatory Conflicts And Overlaps

Regulatory conflict and overlap--long regarded as major obstacles in the regulatory process--are not a major problem in relation to other Federal, State, and local regulatory issues. Although regulatory agencies have improved the coordination of their rulemaking efforts, further improvements are possible.

The costs associated with concurrent regulatory requirements should be assessed. Potential conflicts and overlaps should be identified and resolved. Closer working relationships should be established between Federal, State, and local regulatory authorities.

In this report, GAO recommends specific ways in which the Office of Management and Budget can improve regulatory coordination as it implements its regulatory management responsibilities.



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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the nature, extent, and causes of conflicting and overlapping regulatory requirements and makes recommendations to the Office of Management and Budget for improved regulatory coordination.

GAO undertook this review because there has been great concern in the Congress and in the business community that overlapping and conflicting regulations are inefficient and impose a substantial burden on the private sector. This report is intended to provide information to the Congress as it evaluates the extent of the problem and what remedies are appropriate.

Copies of this report are being sent to the Director, Office of Management and Budget; the Secretary of Health and Human Services; the Secretary of Labor; the Administrator, Environmental Protection Agency; and the Acting Chairman, Equal Employment Opportunity Commission.

A handwritten signature in cursive script that reads "Milton J. Aorolan".

Acting Comptroller General
of the United States

D I G E S T

Although conflicting and overlapping regulatory requirements are principal targets of regulatory reform, GAO's research shows that regulatory conflict and overlap are not a major problem relative to other regulatory issues. This is partly because of the progress being made by the Executive Office of the President and the regulatory agencies in coordinating rulemaking efforts. In this report, GAO examines the types of conflict and overlap that occur, the reasons they occur, and what is being done to resolve them. GAO believes that regulatory problems identified in this report can largely be resolved by OMB's refining its implementation of Executive Order 12291, which is intended to improve regulatory management.

CONFLICT AND OVERLAP CONCERNS
OF THE PRIVATE SECTOR

Regulatory conflict occurs when compliance with one regulation results in the inability to comply with another, whether Federal, State, or local. Regulatory overlap occurs when duplicate requirements result from separate regulations that have similar objectives or are targeted at the same industrial process.

GAO asked 50 of the Nation's largest firms to provide specific examples of regulatory conflict and overlap that had affected them adversely. The four agencies whose rules they mentioned most frequently--Equal Employment Opportunity Commission (EEOC), Environmental Protection Agency (EPA), Food and Drug Administration (FDA), and Occupational Safety and Health Administration (OSHA)--commented on the 52 examples they provided. About half of the companies that provided examples told GAO that regulatory conflict and overlap were not a major problem or that other regulatory issues--especially excessive regulation, excessive paperwork, and the unresponsiveness of the rulemaking process--were of equal or greater concern to them. Moreover, regulatory conflict and overlap did not appear to pose a major

economic burden to them, although they found it difficult to make specific cost estimates. (chapter 2)

Twenty of the 52 conflict and overlap examples represent interacting requirements, in which compliance with a requirement in one area brings a company under the jurisdiction of rules in another area. Meeting both requirements may be possible but often only at additional cost over and above what companies would incur if the two rules did not apply concurrently. An example is that many companies must consider installing pollution control equipment to meet the requirements to use less oil and gas by switching to coal. (pp. 11-14)

Fourteen other examples represent overlapping jurisdictions, in which two or more agencies have requirements regarding the same product, substance, or process. For example, OSHA and EPA have different standards for measuring sulfur dioxide, even though both standards are based on the same toxicological data. The agencies justify the difference in responding that they protect different constituencies. OSHA is responsible for protecting workers in occupational settings; EPA protects the public at large. Agencies try to minimize the adverse effects of overlapping jurisdictions by using such devices as interagency agreements. (pp. 15-17)

The remaining 18 examples represent duplicate enforcement, in which two or more agencies have responsibility for investigating discrimination complaints, issuing environmental permits, conducting workplace safety inspections, and the like. In many of these examples, companies complained about delays that result from duplicate Federal and State enforcement and the confusion of having one agency's decision open to later interpretation and revision by other agencies. Federal agencies responded that they are attempting to minimize the effects of duplicate enforcement by relying more on State regulatory authorities. (pp. 17-20)

SOURCES OF REGULATORY CONFLICT AND OVERLAP

GAO's data and other recent studies identify authorizing legislation as one source of regulatory conflict and overlap. The statutory

causes of conflict and overlap include single-purpose legislation that fails to establish priorities among legitimate but competing social needs, broad delegations of statutory authority that fail to establish clear jurisdictions, and overly specific procedural requirements that hamper opportunities for regulatory agencies to work closely together. With a few exceptions, however, most regulatory agencies have considerable flexibility to resolve conflict and overlap problems. (pp. 22-25)

Another source of regulatory conflict and overlap is the manner in which regulatory agencies exercise their authority. For example, conflict and overlap may result when Federal agencies fail to coordinate regulatory actions with each other or fail to work with the private sector to identify potential problem areas. Publishing an agenda of proposed rules and a semiannual calendar of major rules is a positive step in coordinating regulatory actions. (pp. 25-26)

A third source of regulatory conflict and overlap is the sharing of rulemaking and enforcement responsibilities by Federal and State regulatory authorities. Opportunities for conflict and overlap occur because Federal and State standards are not always consistent, Federal agencies sometimes duplicate State enforcement actions in monitoring State implementation of Federal standards, States maintain independent regulatory programs concurrent with Federal programs, and Federal and State regulatory agencies generally do not work closely together during the initial development of proposed rules. (pp. 28-31)

PROGRESS IN REDUCING CONFLICTING AND OVERLAPPING REGULATIONS

Congressional efforts to reduce conflict and overlap have concentrated on improving regulatory management rather than making major structural realignments of agencies' responsibilities. Although they are not explicitly intended to eliminate regulatory conflict and overlap, congressional oversight procedures, regulatory impact analyses of new legislation, and clear delegations of regulatory authority do help. The Congress is presently considering regulatory reform legislation that would enact into law and extend to all regulatory agencies

requirements similar to those now in Executive Order 12291, issued in February 1981. (chapter 2)

Executive Order 12291 and its predecessor Order 12044 have improved coordination between regulatory agencies, strengthened OMB's oversight of the regulatory process, and attached greater importance to analyzing the costs and benefits of proposed regulatory actions. Interagency coordinating committees and interagency agreements have also helped instrumentally in resolving specific issues relating to overlapping regulatory jurisdictions. The U.S. Regulatory Council made a positive contribution, too, before it was disbanded and most of its responsibilities transferred to OMB. (pp. 32-40)

Federal regulatory agencies have also made progress toward eliminating conflict and overlap. They have done this partly by transferring regulatory responsibilities to the States. Where the transition is incomplete, however, confusion remains about how to resolve regulatory conflict and overlap issues. (pp. 40-43)

CONCLUSIONS

Executive Order 12291 lists broad criteria for estimating the costs and benefits of regulatory actions, but it does not explicitly consider interacting requirements. Effects attributable to interacting requirements may not be readily apparent, but companies are sometimes hampered in complying with several requirements that are otherwise unrelated. Interacting requirements should be made an explicit part of regulatory impact analysis. (p. 44)

OMB's responsibilities under Executive Order 12291 include the identification of duplicate, overlapping, and conflicting rules, and it is authorized to require interagency consultations to minimize or eliminate them. How OMB is to identify and resolve conflict and overlap is not yet clear. Successful techniques of the Regulatory Council were the study of selected, heavily regulated industries and direct mediation in some situations. OMB should continue to identify and, when appropriate, mediate problems of intergovernmental regulatory conflict and overlap. (p. 45)

Another OMB responsibility under the Order is to recommend needed changes to regulatory legislation in consultation with interested agencies. Regulatory agencies already have considerable flexibility in mitigating the statutory causes of conflict and overlap. To the extent that legislative changes are needed, however, OMB should be alert to the statutory causes of conflict and overlap as it reviews regulatory legislation. (p. 45)

A priority of Executive Order 12291 and the present Administration that GAO agrees with places greater emphasis on reviewing existing rules. Because of the natural interdependence of closely related rules, GAO believes that reviews of such rules should be conducted simultaneously. (pp. 45-46)

GAO's study supports the need for close Federal-State working relationships. State and local government participation at an early stage in both the rulemaking and enforcement processes should be encouraged as OMB implements the Executive Order. (p. 46)

RECOMMENDATIONS TO
THE DIRECTOR OF OMB

GAO recommends that the Director of the Office of Management and Budget, in cooperation with the Task Force on Regulatory Relief and under the authority granted to OMB in Executive Order 12291,

- require that regulatory agencies assess the effects of interacting regulatory requirements as part of their procedures in conducting regulatory impact analyses;
- continue to identify and mediate problems of Federal and intergovernmental regulatory conflict and overlap;
- identify and evaluate statutory impediments to regulatory coordination and recommend legislative changes when necessary to allow agencies to work together;
- require that regulatory agencies schedule for concurrent review closely related existing rules that establish requirements for the same product, process, or substance.

The Director of OMB should also encourage the early participation of State and local regulatory authorities in the review of regulatory activities.

IMPROVING CONGRESSIONAL OVERSIGHT

A number of regulatory reform bills being considered by the 97th Congress would strengthen the executive branch in resolving conflict and overlap issues. In particular, S. 1080 would make many of the requirements of Executive Order 12291 statutory. The refinements that GAO recommends in this report for the implementation of the Order would apply to the implementation of that legislation.

Senate rule 26.11(b), requiring Senate committees to prepare regulatory impact analyses of proposed legislation, could also be particularly valuable in anticipating and resolving the statutory sources of conflict and overlap, including statutes that adopt competing national goals, establish overlapping jurisdictions, and restrict the procedural flexibility of regulatory agencies.

AGENCY COMMENTS AND GAO'S RESPONSE

The Office of Management and Budget generally concurs with GAO's recommendations. OMB suggests that in this report GAO mention more prominently the roles of the Paperwork Reduction Act, the Regulatory Flexibility Act, and the Task Force on Regulatory Relief in resolving problems of regulatory conflict and overlap. Where appropriate, GAO has amplified the discussion of these roles.

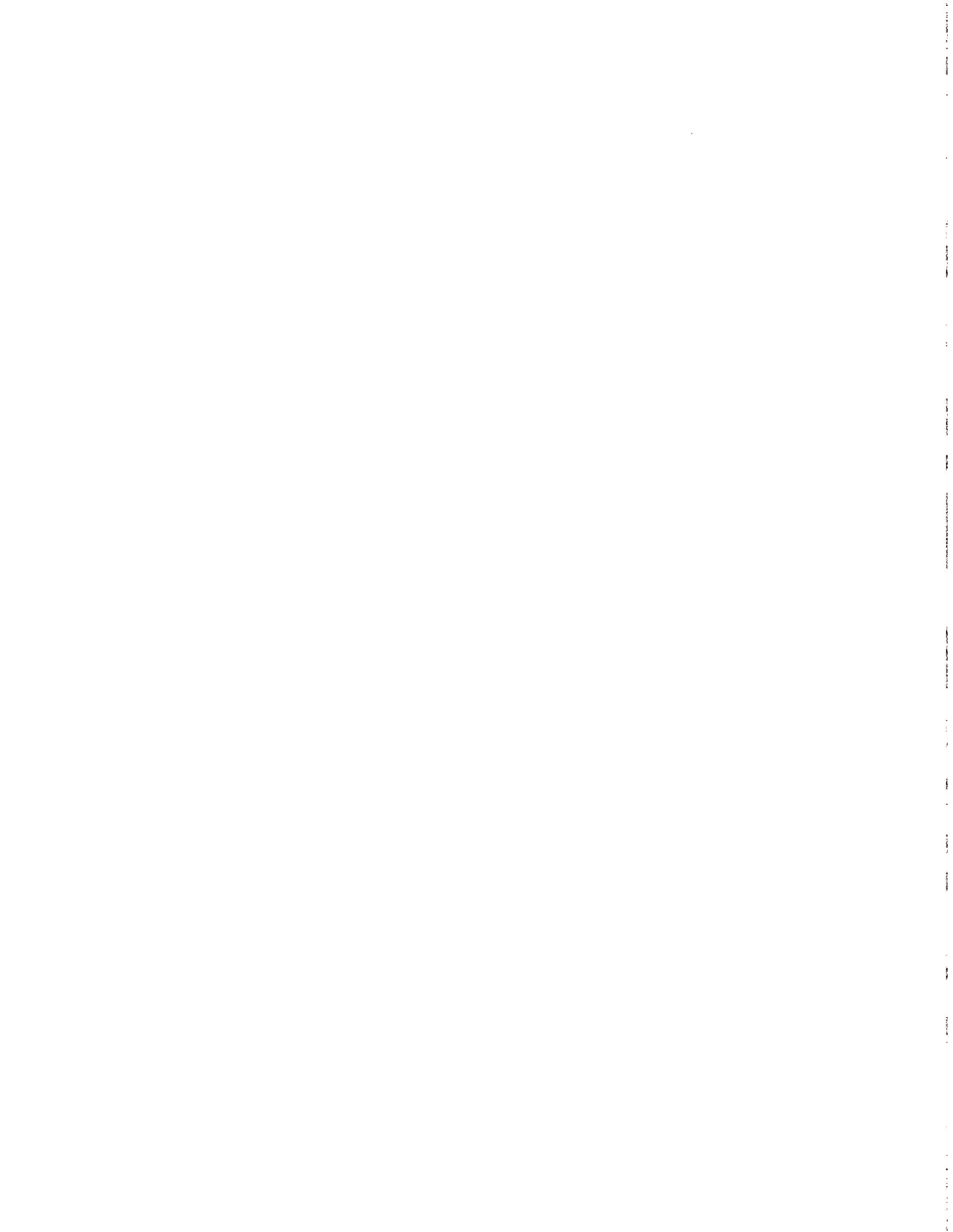
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ABBREVIATIONS

BACT	Best available control technology
BATF	Bureau of Alcohol, Tobacco, and Firearms
CFR	Code of Federal Regulations
CPSC	Consumer Product Safety Commission
DEA	Drug Enforcement Agency
DOE	Department of Energy
DOL	Department of Labor
DOT	Department of Transportation
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
FDA	Food and Drug Administration
F.R.	Federal Register
FTC	Federal Trade Commission
GAO	General Accounting Office
IRLG	Interagency Regulatory Liaison Group
LAER	Lowest achievable emission rate
NESHAP	National emission standards for hazardous air pollutants
NIOSH	National Institute for Occupational Safety
NPDES	National pollutant discharge elimination system
NSPS	New source performance standard
OFCCP	Office of Federal Contract Compliance Program
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
PSD	Prevention of significant deterioration
U.S.C.	United States Code
USDA	Department of Agriculture



CHAPTER 1

INTRODUCTION

The private sector, the media, and congressional testimony frequently criticize regulatory conflict and overlap. They say that over the last 15 years increasing Federal regulation has placed too great a burden on the economy, is ineffective, and should be reformed. In this report, we examine the types of conflict and overlap that exist, the reasons for them, and how they are being resolved.

THE SIZE, SCOPE, AND COST OF FEDERAL REGULATION

Government agencies regulate the private sector by imposing rules, standards, and guidelines on it in order to achieve various policy goals. The number of such rules and ruling agencies has expanded greatly in the last 15 years. According to a 1980 White House report, there were 58 regulatory agencies in 1980, and of these 26 or nearly half were created between 1965 and 1975. ^{1/} The 58 agencies issued annually about 2,000 significant rules. At least 150 of these potentially cost the economy more than \$100 million each.

The scope of Federal regulatory mandates has grown. Before 1965, specific industries--communications, transportation, finance--were controlled and for specific economic factors such as rate setting or market entry. Federal intervention in an industry was typically designed to remedy a perceived failure of the competitive free market that might otherwise lead to high prices, reduced output, or monopoly profit. By 1980, regulatory legislation had come to address broader societal concerns about the environment, civil rights, and public health and safety. Today, social regulations typically seek to transfer costs from society as a whole to the entities who create them.

The budgets of regulatory agencies and the costs of complying with regulations have increased. Agency administrative costs rose to \$6 billion in 1980. Compliance costs--the costs to the private sector that are directly attributable to meeting agency rules--have been estimated at greater than \$100 billion a year. ^{2/}

Estimating the exact cost of regulation is made difficult by its indirect costs, as when Government intervention inhibits competition or discourages research and development. Moreover,

^{1/}White House Domestic Policy Staff, "Regulatory Reform: President Carter's Program," August 1980.

^{2/}Joint Economic Committee, "Government Regulation: Achieving Social and Economic Balance," June 1980.

both direct and indirect costs must be offset by the benefits of regulation. The benefits of environmental regulation alone, for example, have been estimated as being as high as \$58 billion a year. ^{1/} The indirect costs and the benefits are not easily quantified.

Many people in the Congress, the executive branch, and the private sector endorse the economic and the social goals of regulation but believe that the regulatory process should be reformed. Some have recommended employing alternatives to regulatory controls, such as market incentives. Another recommendation is to deregulate industries that no longer require regulation. Other suggestions include analyzing the costs and benefits associated with regulatory actions, reducing the paperwork burden on the private sector, and reducing delays in issuing permits, setting standards, and issuing guidelines. Some believe that it would help to relieve the additional burden that regulations place on small business. In this report, we focus on the recommendation that regulatory requirements be reformed by identifying and minimizing overlapping, conflicting, and duplicate rules.

Regulatory conflict happens when compliance with one rule results in the inability to comply with another. For example, one agency might require that the floors of a meat plant be kept clean by repeated washing while another requires that, for the safety of the workers, the floors be kept dry. Conflict can be broad, as when national policy encourages both coal use and the need for environmental protection. Conflict can be narrow, as when personnel in a single agency enforce the same rule differently. Conflict can occur between several Federal agencies or between Federal and State agencies.

Similarly, regulatory overlap may be broad or narrow or intergovernmental. It exists when two or more regulations have the same or similar objectives or are targeted at the same industrial process. Examples are several agencies setting standards for defining and labeling flammable materials and both Federal and State agencies setting requirements for issuing environmental permits.

EXECUTIVE AND CONGRESSIONAL INITIATIVES TO REFORM FEDERAL REGULATION

Every President in the last 40 years has sought and received advice on the regulatory process. Concerned about its recently increasing size and costs, President Ford established the Domestic Council Review Group on Regulatory Reform in 1975. This

^{1/}U.S. Senate Committee on Government Affairs, "Benefits of Environmental, Health, and Safety Regulation," prepared by MIT Center for Policy Alternatives, 96th Cong., 2d Sess. (1980).

called for a thorough understanding of the causes of regulatory conflict and overlap. In 1978, President Carter issued Executive Order 12044 to make Federal regulation more clear, less burdensome, and more cost-effective. One of the Order's objectives was to minimize regulatory conflict and overlap. In February 1981, replacing Executive Order 12044 with Executive Order 12291, President Reagan required the Office of Management and Budget to identify and minimize duplicate, overlapping, and conflicting rules.

The Congress has also extensively studied regulatory issues and considered reform legislation. In 1978, the Senate Committee on Governmental Affairs completed a 3-year study of organizational anomalies, conflicts, overlaps, redundancies, and failures of coordination in energy, food, antitrust banking, transportation, health, and safety. The Committee identified instances of regulatory waste and duplication but doubted whether a major structural change was needed. It stated that

In most areas, improved coordination between agencies, some reordering of power and functions between executive agencies and independent regulatory commissions and greater efforts by Congress to rationalize and consolidate imprecise mandates can go a long way toward improving government structure to regulate effectively. 1/

Legislation to improve interagency coordination and strengthen congressional oversight was being considered at the time we made our review for this report. One proposal (S. 1080) would make some of the provisions in Executive Order 12291 statutory and extend its coverage to independent regulatory agencies.

In September 1980, the Regulatory Flexibility Act (Public Law 96-354) eased the regulatory burden on small businesses. Agencies are now required to analyze the economic effect of significant proposed and existing rules on small businesses and to identify rules that may duplicate, overlap, or conflict with others. Compliance with the Act is monitored by the Chief Counsel for Advocacy of the Small Business Administration. Because it was enacted only recently, we have not assessed the Act's role in reducing conflict and overlap.

EARLIER GAO STUDIES ON REGULATORY REFORM

In 1977, we attributed regulatory conflict and overlap to poor coordination between Federal regulators and to inconsistent regulatory objectives. We also cautioned against organizational

1/Senate Committee on Governmental Affairs, Study on Federal Regulations. Vol. V. Regulatory Organization, December 1977, p. 2.

reforms that might hide from public view the nature and extent of trade-offs that are necessarily made in achieving different policy objectives. 1/

In the following year, we addressed regulatory conflict and overlap again, when we commented on Regulatory Organization, volume V of the 1977 Senate Governmental Affairs committee Study on Federal Regulation. We stated then that interagency coordination will most likely succeed if agencies have clear jurisdictional boundaries. We also stated that policy issues on ambiguous statutory responsibilities and conflicting claims about them should be resolved by the Congress and the President. 2/

In 1980, we issued 27 reports on specific regulatory issues. In one of those reports, "Energy Health and Safety Issues Need a Coordinated Approach," we identified 20 Federal agencies and one interagency group that all act independently in regulating energy, health, and safety according to their missions, responsibilities, program goals, and administrative procedures. The potential we found for duplication of effort, lack of coordination, and gaps in regulatory coverage supported our conclusion that better leadership is needed in directing and coordinating energy-related health and safety programs.

In the same year, we also found that for the transportation of food, 14 Federal agencies have issued 1,300 regulations covering 9,752 sections of the Code of Federal Regulations. These regulations require some 30,000 separate actions for compliance. We recommended the development of a regulatory indexing system for locating applicable regulations, analyzing regulatory overlap, and understanding better the structure of Federal regulation. 3/

Duplicate reporting requirements compound an already overwhelming Federal paperwork burden. We have issued several reports on this, too. 4/ Recently, we worked closely with the

1/"Government Regulatory Activity: Justification Processes, Impacts, and Alternatives," U.S. General Accounting Office, PAD-77-34, June 3, 1977.

2/Letter to Chairman, U.S. Senate, Committee on Governmental Affairs, PAD-78-68, March 29, 1978.

3/"Maze of Food Regulations--Need for a Regulation Indexing System," U.S. General Accounting Office, CED-80-44, February 2, 1980.

4/See, for example, "Federal Paperwork: Its Impact on American Business," U.S. General Accounting Office, GGD-79-4, November 17, 1978.

House Committee on Government Operations and the Senate Committee on Governmental Affairs in developing the Paperwork Reduction Act of 1980 (Public Law 96-511), which became effective April 1, 1981.

OBJECTIVES, SCOPE, AND METHODOLOGY

Our objective in this report is to examine the types of regulatory conflict and overlap, the reasons they occur, and what is being done to resolve them. Accordingly, in chapters 2-5, we discuss conflict and overlap in the private sector from examples large companies supplied us (chapter 2), we identify the reasons for conflict and overlap (chapter 3), we examine initiatives by the Congress and the executive branch to solve the problem (chapter 4), and we assess these initiatives and make recommendations to the Director of the Office of Management and Budget (chapter 5). In appendix I, we summarize the private sector examples of conflict and overlap and present agency responses to them.

To discuss regulatory management and to obtain their views on regulatory conflict and overlap, we met with officials of the Office of Management and Budget, the Regulatory Council, the Interagency Regulatory Liaison Group, the Environmental Protection Agency, the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, and the Food and Drug Administration. We reviewed pertinent documents from these groups, we studied reports by others--among them the American Bar Association and the Congressional Research Service--and we reviewed appropriate congressional reports and hearings. We met with congressional staff members, including those of the Senate Committee on Governmental Affairs, the Senate Committee on Small Business, and the Joint Economic Committee. To obtain viewpoints of State and local officials, we spoke with nine State and local participants in a January 1980 White House conference on State and local regulatory reform.

We also asked 50 large companies to provide us with specific examples of conflict and overlap. We limited our request to companies with corporate headquarters in four States--Indiana, Kentucky, Ohio, and West Virginia--because of resource considerations in following up on their responses. All the companies were listed in Fortune Magazine's top 500 industrial or top 50 retail establishments, and many included information from subsidiaries and plants outside the four-State area. A total of 46 industrial and 4 retail companies met our criteria, and within the four States they represented a wide variety of manufacturing and retailing firms within a reasonable distance of our regional office conducting the survey. 1/

1/We selected the companies we requested to participate in our review from Fortune Magazine's July 16, 1979, listing of the top 50 retail establishments and May 5, 1980, listing of the top 500 industrial establishments.

Companies on the Fortune lists are ranked by annual sales and grouped by economic sector. The 1979 sales for the 50 firms in our sample accounted for 7.4 percent of total sales for the 550 Fortune companies. The 46 industrial firms represented 16 of the 28 industrial groupings in Fortune. Among the 46 firms, 7 were in the motor vehicles group; 7 were in the industrial and farm equipment group; 5 were in rubber and plastics; 4 were in glass, concrete, abrasives, and gypsum; 4 were in electronics and appliances; 4 were in chemicals.

We asked the companies to provide us with specific examples of existing Federal and Federal-State regulatory conflict and overlap that had affected them adversely. We excluded proposed rules because these can be modified before they become requirements. We also excluded national policy conflicts because we wanted to focus on specific requirements instead of general regulatory goals; we considered policy conflicts only when they had become specific requirements by means of implemented regulations. We excluded duplicate paperwork requirements because this issue is being studied separately by our General Government Division.

In analyzing the examples, we intended not to resolve individual problems but to identify systemic weaknesses in the regulatory process. Forty-two of the 50 companies, or 84 percent, responded to our request; of these, 31 gave us examples of regulatory problems, and 11 reported that they had not been affected adversely by regulatory conflict and overlap. The 31 companies gave us a total of 152 examples, and 78 of these met our definition of regulatory conflict and overlap. (We discuss the 74 others generally in chapter 2.)

The 78 examples of conflict and overlap involved requirements of 27 Federal agencies. We asked the four regulatory agencies whose rules were cited the most frequently to comment on the validity of the alleged problems and to say what steps, if any, they had taken to correct them. These were the Environmental Protection Agency (named in 22 examples), the Occupational Safety and Health Administration (16 examples), the Food and Drug Administration (14 examples), and the Equal Employment Opportunity Commission (13 examples). These four agencies were named together in some combination in 52 of the 78 examples. To identify these 52 more clearly, we asked the companies to comment on the agency responses; 14 of the 20 companies that had provided the 52 examples did so comment. Appendix I gives summaries of the 52 company-supplied examples, responses from the four agencies, and, where pertinent, the company follow-up responses.

The agencies with which we discussed the examples noted that some of them are several years old and have ceased to be problems because of statutory or regulatory changes. For some of the other examples, the agencies noted that the companies had not known or understood the regulatory requirements. We

therefore present these examples not necessarily as currently valid problems but as what regulated companies perceived as problems.

Our sample is restricted geographically and excludes some economic sectors, health care and finance among them. Therefore, the examples do not constitute a statistically valid sample of American business experience. Nevertheless, because of the wide range of regulatory programs that these firms are subject to, the data reasonably represent most of the types of problem and perception that many large businesses have about regulatory conflict and overlap. The data are also sufficiently sensitive to demonstrate the presence or absence of systemic causes of conflict and overlap in the regulatory process.

We solicited corroboration of or other comments about the examples of problems from 13 trade associations headquartered in Washington, D.C., and from the U.S. Chamber of Commerce. We also compared our results with a recent study by the Conference Board, which compiled, at our request, a list of conflict and overlap examples cited by the 300 respondents to their study.

We did not include small businesses in our sample because large firms have more resources for providing the detailed information we requested. Various studies and congressional testimony have shown that the regulatory problems experienced by small businesses mirror and may even exceed those of large businesses. This is because small businesses are less able to absorb inefficiencies in the regulatory process.

CHAPTER 2

REGULATORY CONFLICT AND OVERLAP

IN THE PRIVATE SECTOR

The 42 companies that responded to our inquiry gave us 78 examples of regulatory conflict and overlap. They also expressed an equal, if not a greater, dissatisfaction with excessive regulation, excessive paperwork, and failures in the rulemaking process itself, giving us 74 examples of problems not having to do with conflict and overlap as we have defined them. As a result, the data raise questions about the severity of conflict and overlap relative to these other issues.

The 78 conflict and overlap examples can be studied in three categories. Compliance with one requirement may bring a company under the jurisdiction of the rules of another. Two or more agencies may have the same or different requirements about one product, substance, or process. Two or more agencies may have duplicate enforcement responsibilities.

The effects of these three types of problem are difficult to quantify, but few examples appear to impose a major economic burden on the companies that provided them. We were not given instances of compliance with one requirement preventing compliance with another. However, companies do face additional considerations and costs when meeting concurrent requirements.

OTHER STUDIES OF CONFLICT AND OVERLAP

Other surveys of the private sector have generally concluded that regulatory conflict and overlap are significant handicaps. In summarizing the regulatory problems of 300 business executives from 200 companies, the Conference Board, an independent, not-for-profit research institution, concluded about overlapping jurisdictions that

Among all the basic problems experienced by executives, this one seems the most common; the most unnecessary; and, to some extent, the most dangerous since it saps both regulatory authority and responsibility. Moreover, it is seen by many corporate officers as a seedbed for inter- and intra-agency conflicts. 1/

In a report for the Joint Economic Committee, the Congressional Research Service found that the most frequently

1/Conference Board, "Regulatory Problems and Regulatory Reform: The Perceptions of Business," 1980, p. 7.

reported conflicts in eight major industries or sectors had to do with Federal rules in energy, the environment, health, and safety. Conflicts between Federal, State, and local rules were cited mainly in connection with setting standards and issuing permits for new plant facilities. Industry representatives also reported duplicate reporting requirements and inspections. 1/

A recent report by the U.S. Regulatory Council addressed industry charges that regulatory conflict and overlap hinder coal production. The Council concluded that problems from overlapping and inconsistent regulations occur more frequently between Federal and State agencies than between Federal agencies. It concluded, too, that significant overlap and inconsistency in the regulatory process arise in enforcing regulations. It also stated that coal operators are often unaware of the substance of agency requirements. 2/

COMPANY RESPONSES TO THE PRESENT SURVEY

In contrast to this trend, 74 or about half of the examples in our survey of companies reflect dissatisfaction with aspects of the regulatory process other than conflict and overlap. They indicated that some regulations and rules are unreasonable, too costly to comply with, poorly conceived, or administratively burdensome. They reported 23 instances of excessive regulation, 18 instances of excessive paperwork, and 26 potential conflicts and overlaps between an existing and a proposed rule. Many of these corresponded to the complaints the Conference Board summarized, in addition to problems of conflict and overlap, as exemplifying overextension of agency mandates, frequently because of concern with means as well as goals, leading agencies to dictate how goals will be met; unilateral and retroactive rulemaking and overregulation without regard to cost or efficiency; adversary attitudes toward business; delays in exercising mandated authority; and duplicate and unnecessary reporting requirements.

One respondent to our inquiry put into particular perspective many of the responses that are about problems other than conflict and overlap. This company traced its regulatory problems to different aspects of overregulation. It said that overprogramming occurs when the Congress requires an agency to develop an excessive number of regulatory programs. Obtuse regulation is agency development of regulations that are unnecessarily inappropriately complex. Quixotic regulation is impractical

1/Joint Economic Committee, An Inquiry into Conflicting and Duplicative Regulatory Requirements Affecting Selected Industries and Sectors, Congressional Research Service, July 1980.

2/U.S. Regulatory Council, "Cooperation and Conflict: Regulating Coal Production," January 1981.

regulatory programming through congressional, administrative, or judicial action. Excessive regulation happens when agencies go beyond express or implied limitations in enforcing or implementing their legislative mandates.

In our survey, 23 companies expressed several concerns about the rulemaking process itself. Eighteen provided examples of proposed rules conflicting with existing rules. Several took issue with how agencies obtain and evaluate comments on proposed rules; 6 companies characterized the comment period as too short or contended that regulatory agencies generally ignore the comments that are submitted (although 5 companies said that they were satisfied with the consideration agencies give to their comments on proposed rules). ^{1/} Three companies also complained about the great number of proposed rules and the costs of staying current with them, one company estimating that it spends 30 to 40 percent of its engineering resources to prepare comments on proposed regulations and track regulatory requirements. This company and one other believe that agencies do not adequately research the facts before proposing new rules and, consequently, the companies end up doing the agencies' homework.

About half of the companies told us that regulatory conflicts and overlaps are not, in fact, a significant problem or that these other regulatory issues concern them at least as much and sometimes more. One official pointed out that

conflicts and overlaps are problems that are essentially "self-policed." Agencies customarily and appropriately take great pains to protect their areas of jurisdiction. When jurisdictional conflicts arise, agencies generally resolve perceived overlaps and conflicts as a matter of self-interest. Such conflicts as may arise are usually resolved before they become long-term burdens. Similarly, when corporations are faced with conflicting regulatory requirements, resolution is usually swift. We will usually satisfy the regulatory requirement that makes the most sense. The next step is to advise the agency seeking to impose a conflicting requirement of the conflict. At this point the "turf protecting" mechanism described above generally resolves the problem. Further, agencies are generally disinclined to enforce conflicting requirements what with the potential for embarrassing publicity.

^{1/}Regulatory agencies commonly allow a minimum of 30 days for public comment on a notice of proposed rulemaking but may extend the comment period for significant rules. Some of the time pressures attributed to the comment period are also alleviated by semiannual agendas of proposed rules and advance notices of proposed rulemaking. OMB also publishes the Calendar of Federal Regulations as an overview of important rules under development.

An official of another company agreed that most regulatory agencies attempt to eliminate as many conflicts and overlaps as possible, adding that

To a certain extent the conflicting and overlapping regulations represent a superficial "tip of the iceberg" in terms of the real cost of regulation. However, conflicting and overlapping regulations do represent some of the more blatant and ludicrous aspects of regulation.

THE TYPES OF REGULATORY CONFLICT AND OVERLAP

Of the 78 examples of conflict and overlap, only 3 represented inconsistent enforcement, in which different agency departments, regional offices, or inspectors make differing interpretations of the same rule. The 75 other examples represent difficulties of

- interacting requirements, in which compliance with a requirement in one area brings a company under the jurisdiction of rules in another area,
- overlapping jurisdictions, in which two or more agencies have requirements about the same product, substance, or process, or
- duplicate enforcement, in which two or more agencies have responsibilities for the same activities (investigating complaints, issuing permits, conducting inspections, and the like).

Interacting requirements and overlapping jurisdictions generally involve only Federal agencies, while duplicate enforcement generally involves Federal and State regulatory agencies together. In the rest of this chapter, we discuss the 52 examples of these 3 types of conflict and overlap that involved one or more of four agencies--the Equal Employment Opportunity Commission (EEOC), the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety and Health Administration (OSHA).

Interacting requirements

The companies gave us 20 examples of interacting requirements. Although the companies regarded many of these examples as regulatory conflicts, compliance with one requirement rarely, if ever, prevented compliance with another. A more accurate representation is that one requirement actually or potentially affected the way a company complied with another requirement. The companies perceived interacting requirements as generating, for example, conflicts between rules for maintaining workplace safety and for protecting equal employment opportunities (see appendix I, examples 3, 8, 10, 17), maintaining both workplace

safety and product sanitation (examples 1, 2, 9, 14, 18, 20), and protecting the environment and decreasing oil and gas use (examples 12, 13).

Companies believe costs increase

Interacting requirements create additional regulatory responsibilities for companies that have to meet two requirements simultaneously. This sometimes means greater administrative and compliance costs, a concern in 9 of the 20 examples (1, 11-14, 16-18, 20). Companies questioned not the requirements individually but, rather, applying both concurrently.

Efforts by the private sector to meet the objectives of both energy conservation and environmental protection provide an illustration. The Department of Energy (DOE) is charged with implementing the Powerplant and Industrial Fuel Use Act of 1978 (commonly known as the Fuel Use Act), whose objective is to reduce U.S. dependence on oil and gas. Under the Act, companies are required to use alternative energy sources to fuel large boilers. The best alternative is often coal, but switching to coal may increase sulfur emission into the air and, therefore, may require the installation of costly pollution control equipment in order to meet the clean air standards of the Environmental Protection Agency.

Companies that responded to our survey believe that satisfying both DOE and EPA is time-consuming and administratively costly (example 12). Placing the burden of proof on the companies forces them into the middle between the two agencies. To meet the requirements of both, companies must either convince EPA that its clean air standards will be met or, failing that, convince DOE that an alternative fuel cannot be used. Companies told us that DOE does not consider denial of an environmental permit conclusive evidence that the petitioner cannot satisfy environmental requirements. They added that Fuel Use Act regulations require that environmental compliance be examined in the context of the availability of pollution control equipment that can provide the "maximum possible reduction of pollution," although this is beyond EPA's requirement that companies use the best available control technology.

EPA responded with statistics on the number of successful equipment conversions, noting also that the Fuel Use Act requires coordination between EPA and DOE. Recent studies contend, however, that the costs of meeting both DOE's and EPA's requirements may be made greater than they need to be because of EPA's insistence on the use of costly sulfur scrubbing equipment rather than alternative equipment that is more efficient and effective. 1/

1/See Bruce Ackerman and William T. Hassler, Clean Coal/Dirty Air (New Haven: Yale University Press, 1981).

Thus satisfying several requirements simultaneously may result in somewhat more complex and costly solutions than if only one applied.

The potential cost of interacting requirements is further typified by an FDA requirement to keep floors clean and an OSHA requirement to keep floors not slippery (examples 1, 20). Several companies interpreted these requirements to mean that floors must be washed yet kept dry. OSHA and FDA believe their rules are consistent because companies can, among other things, install raised platforms that drain quickly or require that workers wear safety shoes that grip wet surfaces.

Such options do allow employers to meet both requirements but at additional cost. This is probably inevitable if policy decisions are to protect more than one constituency.

Companies fear sanctions

In 11 of the interacting requirement examples, companies perceived that meeting one requirement would subject them to sanctions under another requirement (examples 3-10, 15, 17, 19). In a few cases, companies had been cited for violating a rule or discrimination complaints had been filed against them. In most cases, however, they were concerned about potential sanctions.

One pharmaceutical company rejected a job applicant who had failed to pass a qualifications test designed to meet FDA requirements. While FDA does not establish job specifications, it does require that people who oversee key aspects of, for example, manufacturing or testing processes have suitable training and experience. In this case, the job applicant filed an EEOC complaint against the pharmaceutical company. EEOC ruled that the company's testing procedures did not offer a valid test of the requirements for the position, and the company subsequently hired the applicant. Later, FDA cited the company for placing an unqualified person in the position (example 19).

In commenting on this example, FDA speculated that the company may have been at fault because it was responsible for designing the test to meet the FDA qualification standard. ^{1/}EEOC stated that it does not monitor job qualification requirements developed by other agencies but that agencies generally follow the Federal Uniform Guidelines on Employee Selection Procedures, which protect equal employment opportunities.

Another pharmaceutical firm told us that questioning job applicants about their criminal records, which it perceived as a requirement of the Drug Enforcement Agency (DEA), would sub-

^{1/}To preserve the confidentiality of the respondents, we did not provide FDA with the name of the company or specifics of the incident.

ject it to discrimination complaints because rejecting applicants on this basis might have an unlawfully disparate effect on minorities (example 15). EEOC responded that it distinguishes between arrest records and conviction records and has determined that asking questions about arrest records is discriminatory. Employers may solicit information on convictions and reject an applicant who has had a job-related conviction, but this would not preclude the applicant from filing a discrimination complaint. EEOC decides the merits of complaints case by case.

EEOC also pointed out that DEA recommends but does not require that companies ask prospective employees whether they have had criminal convictions or are currently under a formal charge of having committed a criminal offense (21 CFR 1301.90). The DEA regulation does not explicitly state that companies must seek such information, but we believe that most would read it as a requirement, not a recommendation. The regulation characterizes knowledge of an applicant's use of controlled substances as "vital to fairly assess the likelihood of an employee committing a drug security breach" and adds that "It is, therefore, assumed that the following questions [on convictions, current pending charges, and use of narcotics] will become a part of an employer's comprehensive screening program." Therefore, while DEA's and EEOC's requirements may not conflict technically (although asking about pending charges may be questionable), it is easy to see how a company would believe that following the DEA regulation could get it into trouble with EEOC.

Agencies believe companies misunderstand requirements

A common agency response to the examples of interacting requirements was to disagree with the company representations of the problems. Agencies did not agree that any of these examples showed that compliance with one requirement would result in non-compliance with another. In 12 of the 20 examples, the agencies questioned the companies' understanding of the requirements (examples 1, 3-5, 7, 10, 11, 14, 15, 17, 18, 20).

In the conflict over wet and dry floors, for example, OSHA pointed out that it does not require dry floors and has approved several ways--raised wooden platforms, safety shoes, waivers on the dry floor requirement--to avoid the apparent inconsistency. In this particular example, OSHA had granted a waiver that allowed the company to continue washing its floors.

Another company told us that the steel industry was concerned about an EPA requirement to construct sheds over coke ovens in order to capture gas and particulate emissions that might otherwise escape from steel plants into the environment (example 11). The EPA requirement would conflict with OSHA's because the sheds would concentrate the hazardous emissions in the work area. EPA commented, however, that coke oven sheds are not a general requirement under new source performance standards and that operators of some existing coke ovens use

sheds, but proper ventilation and filtering mitigate danger in the work area. Both EPA and OSHA disagreed with the implication that their requirements were in conflict. Installing ventilation and filtering systems could nonetheless be expected to increase company costs.

We agree with the agencies that the interacting requirements do not pose regulatory conflicts inasmuch as a method of compliance is generally available that allows companies to satisfy both requirements. Nevertheless, the method of compliance sometimes costs companies more or subjects them to more sanctions than if they had only to meet either requirement individually. The examples do represent an increasingly broad range of separate regulatory requirements, primarily in environmental, public health, and safety matters, and the differing regulations are not always mutually exclusive. Although regulated firms often perceive them as manifestations of conflict and overlap, we believe that they reflect the complexity of a modern economy whose industrial processes could injure workers or the public without the imposition of a number of safeguards.

Agencies do not yet consider
interacting requirements
during regulatory analysis

When regulatory agencies evaluate the effect a rule has or may have on the private sector, they do not consider the effects we have attributed to interacting requirements. Executive Order 12291 requires them to estimate costs and benefits when proposing new rules and reviewing existing ones. We asked officials of the Office of Management and Budget and the U.S. Regulatory Council who had addressed the methods regulatory agencies use to analyze rules whether their analyses consider, for example, the costs to a company of insuring that a coke oven shed will not vent hazardous gases into the workplace in addition to the more directly identifiable costs of the sheds themselves. The officials told us that because the measurement of regulatory costs and benefits is relatively new, analyses tend to focus on the more narrow and directly identifiable costs.

Overlapping jurisdictions

Fourteen of the 52 examples reflect overlapping jurisdictions--two or more agencies having requirements that cover the same product, process, or substance (examples 21-34). Companies questioned the need for covering one item by more than one rule, and they expressed frustration over the costs and uncertainties of determining which rule applies. Agencies attributed overlapping requirements to differences in their individual missions. Two agencies' requirements for the same substance may differ because they serve different constituencies. A substance may be subject to requirements that differ depending on its use. Agencies acknowledged the legitimacy of many of the companies' concerns, but in some instances they believe that interagency agreements minimize the adversity.

Requirements protect different regulatory constituencies

Seven examples of overlapping jurisdictions related to an agency's mandate to protect different segments of the population (examples 22, 24, 25, 29, 31, 33, 34). One company told us that OSHA and EPA had different emission standards for sulfur dioxide despite the fact that the standards had been based on essentially the same toxicological research data (example 22). OSHA and EPA responded that the different standards protected different populations and varied with the nature of exposure and the agencies' statutory mandates. In this example, OSHA focused on 8-hour, chronic, and extreme exposures in its occupational studies because its rules specifically protect workers, while EPA emphasized continual exposures in its community studies because its stricter rules protect the public as a whole. Both agencies contend that each standard is appropriate to the population it protects.

Another company told us that four Federal agencies--the Consumer Products Safety Commission (CPSC), the Department of Transportation (DOT), EPA, and OSHA--and one State agency all have authority for classifying and labeling flammable materials (example 24). EPA and OSHA acknowledged some inconsistencies in how flammability was defined. They believe, however, that because CPSC regulates consumer products, DOT regulates the transportation of flammable materials, EPA regulates pesticides and toxic substances, and OSHA regulates hazards in the workplace, coverage by the four agencies is justified. EPA noted some inconsistencies in the labeling and transportation of pesticides and toxic substances but said that it is revising its labeling guidelines to make them consistent with DOT's.

Requirements differ depending on intended product use

In 3 examples, companies were concerned because products were subject to different requirements depending on their intended use (examples 23, 27, 28). For example, one company questioned why xanthum gum, a food additive, is approved for consumption by humans but not animals (example 27). FDA replied that approval for human consumption does not constitute automatic approval for animal consumption. FDA contends that approving a substance for animal use requires additional testing and separate regulation for dosage and tolerance levels for particular animals.

Another company questioned why EPA considered saccharin a hazardous substance (under the Resource Conservation and Recovery Act) while FDA considers it suitable for human consumption. In part, the difference relates to quantity. EPA considers the generation and disposal of more than 1000 kilograms of saccharin a month as a potential health hazard and requires appropriate safeguards. Under the Federal Food, Drug, and Cosmetic Act, FDA regulates the consumption of saccharin directly and in smaller

amounts. FDA initiated action to remove saccharin from the market, but so far the Congress has kept it on the market.

Agencies believe some company concerns are legitimate

Agencies agreed in 7 of the 14 examples that companies had some justification for raising the issue of overlapping requirements (examples 22-25, 31, 33, 34). As evidence of their agreement, FDA agrees with EPA that saccharin poses a threat of cancer and EPA is revising its definition of flammability to make it consistent with DOT's definition.

In another example, the U.S. Department of Agriculture (USDA) acknowledged the need to work more closely with FDA in food packaging (example 31). When several layers of material are used to package food, FDA requires approval of only the material that is in direct contact with the food, provided that it blocks the migration of harmful substances from the outer packaging layers. One company was concerned that a stricter USDA requirement does not allow any of the packaging layers to contain harmful materials. USDA responded that this requirement applies to meat and poultry packaging under the general inspection clauses of the Federal Meat Inspection Act and the Poultry Products Inspection Act. Both agencies indicated that they cooperate closely, but USDA acknowledged the need for further coordination.

Agencies use interagency agreements to resolve overlaps

Agencies said that 4 examples of potential regulatory overlap had been averted by interagency agreements that set forth each agency's responsibilities (examples 26, 28-30). In a fifth instance (32), the issue had been resolved by a court ruling. One company had told us that FDA and the Federal Trade Commission (FTC) have concurrent authority to regulate food advertising. FDA insures that nutritional claims are displayed on food product labels while FTC prevents deception in advertising labels (example 29). The company had alleged that FDA rules for labeling meat containing protein additives affects the advertising. FDA acknowledged the concurrent authority but referred to an interagency agreement in which FTC has agreed not to assert its jurisdiction over food labeling unless it has FDA approval.

Duplicate enforcement

Duplicate enforcement--two or more regulatory agencies having responsibilities for investigating complaints, issuing permits, making inspections, and the like--was a problem in 18 of the 52 examples. Thirteen of these had to do with duplicate Federal and State regulatory responsibilities (examples 36-39, 42-44, 46-49, 51, 52), while 3 related to duplicate enforcement activities within a Federal agency (35, 41, 45). Companies seemed most

concerned about the delays and additional costs of meeting the same requirement twice. They also complained about cost and confusion when one agency's decisions are open to later interpretation and revision by another.

Federal monitoring duplicates
State enforcement

Under various Federal regulatory programs, States are encouraged to assume administrative and enforcement responsibilities, subject to Federal approval. For example, EPA and the States share regulatory responsibilities for the environment under the Clean Air Amendments of 1970, the Federal Water Pollution Control Act Amendments of 1972, the Federal Insecticide, Fungicide, and Rodenticide Act, the Resource Conservation and Recovery Act of 1976, and the Safe Drinking Water Act. The extent of State program involvement depends of the legislation, EPA's eligibility requirements, and the States' willingness to commit the necessary resources. In 8 of the examples, companies complained about duplicate enforcement resulting from State implementation of Federal programs (examples 37-39, 42, 44, 47, 48, 51). Companies believe it occurs often when a Federal agency is dissatisfied with the way a State enforces a program.

For example, 4 companies were concerned about OSHA follow-up inspections at plants as a means of monitoring State worker safety programs (example 38). OSHA's procedures for implementing the Occupational Safety and Health Act of 1970 offer States the opportunity to develop plans to operate their own programs. To gain OSHA approval for its developmental plan, a State must demonstrate that within 3 years it will provide adequate legislation, standards, enforcement, appeals procedures, and employee protection. During this period, OSHA may agree that routine accident and complaint inspections are generally State responsibilities. After that period, OSHA may certify that the State has the legal, administrative, and enforcement means necessary to operate effectively and, following an additional 1-year probation, OSHA may grant final approval of the State plan. OSHA continues to monitor and evaluate the State program and may withdraw its approval if the State fails to maintain its effectiveness.

Company officials stated that under these procedures, dual inspections tie up employees and upset production. OSHA responded that during the 3-year transition period in which it monitors implementation plans, it phases out Federal inspections. OSHA said that dual inspections would not normally occur unless a complaint had been filed with it directly. Some companies believe, however, that when OSHA is dissatisfied with a State's performance, it prolongs the transition period and continues to conduct its own inspections.

Some companies also expressed concern about Federal review and revision of State decisions to grant permits and of State rulings on complaint investigations (examples 42, 44, 47). Under EEOC procedures for implementing the Civil Rights Act of 1964, as

amended, for example, when EEOC receives a charge alleging employment discrimination in a State or local political jurisdiction that has a law or ordinance prohibiting employment discrimination and an agency to enforce it, EEOC must refer the charge to that agency for at least 60 days and must lend substantial weight to the agency's findings. If EEOC does not accept the findings or if the agency does not process the charge within 60 days, EEOC will process it.

Five companies told us that discrimination complaints can be filed with several equal employment opportunity agencies-- local human relations councils, State fair employment practices agencies, and the Federal EEOC--and that one agency's ruling does not preclude a second agency from making an independent investigation and its own ruling (example 47). One company took issue with an EEOC decision to reinvestigate a complaint in which the State had already made a ruling. The complainants had charged that they had not been hired because they had instigated litigation against a company for its spouse rule. The State investigated and then dismissed the charge. Later, the Federal EEOC rejected the State's findings and notified the company that it would conduct its own investigation. EEOC commented that reinvestigations of State rulings are possible but that under recent work-sharing agreements with States, EEOC is relying more on the State agencies. Therefore, if a State's investigation meets Federal standards, EEOC said, most likely it would not pursue an additional investigation.

Concurrent Federal and State
responsibilities lead
to duplicate enforcement

When State agencies choose not to implement and enforce a Federal program, Federal and State regulatory agencies may have concurrent regulatory responsibilities. Companies reported 5 instances of concurrent responsibilities resulting in duplicate inspections or duplicate reviews of permit applications (examples 36, 46, 48, 49, 52). One company took issue with the duplicate EPA and State procedures for granting a permit under the Clean Air Act (example 46). The company's application was subjected to separate public hearings, which it believed served no purpose other than to delay its project by at least 2 months. EPA did not disagree that duplication had occurred but stated that such hearings were the State's prerogative and not under EPA's control. The company believes the EPA could have waived its own hearings. EPA told us that it can waive public hearings but generally does not if there is public interest in holding the hearing and the State is not operating under an EPA-approved plan.

Agencies try to minimize
duplicate enforcement

Federal regulatory agencies acknowledged that duplicate enforcement was at least a potential problem in 9 of the 18 examples (35-37, 39, 41, 46, 47, 50, 52) but said they believe

improvements are being made. For example, they have shifted some enforcement responsibilities to the States. As of February 1981, OSHA shares enforcement responsibilities with at least 10 States under operational status agreements; another 12 States are certified to enforce OSHA rules with limited Federal involvement. Similarly, EEOC reports that it now has work-sharing agreements with 69 of a potential 91 States and localities.

Duplicate enforcement is compounded in environmental matters because companies are subject to review under several programs. EPA acknowledges this. It has attached top priority to consolidating the review of permit applications.

THE SLIGHT ECONOMIC BURDEN
OF REGULATORY CONFLICT
AND OVERLAP

Only a few companies could provide a monetary cost for conflicts and overlaps, because such costs are not normally broken out by company financial management systems. Although they were not quantified, some of the adverse claims were for the costs of litigating a regulatory conflict that cannot be resolved in other ways, the delays associated with multiple permit requirements, the time spent in duplicate inspections or redundant complaint investigations, and the costs of developing new equipment that may or may not satisfy a regulation.

For the most part, however, the companies did not indicate that conflict and overlap are a major economic burden. We asked 19 companies in our survey to estimate how conflict and overlap had affected their operations. Fourteen of the companies provided cost estimates for 32 of the 52 examples:

<u>Annual costs</u>	<u>Number of examples</u>
Little or none; the problem is merely potential or more a nuisance than a financial burden.	14
Up to \$10,000; delays up to 7 days in starting a planned activity.	4
\$10,000 to \$100,000; delays 7-30 days.	2
\$100,000 to \$1 million; delays 30 days to a year.	3
More than \$1 million; delays more than a year.	0
Could not or did not estimate.	<u>9</u>
	32

SUMMARY

Our data do not support the premise that, relative to other regulatory issues, conflict and overlap are major regulatory problems. Companies in our survey reported equal if not greater concern with excessive regulation, excessive paperwork, and frustration with the rulemaking process. The examples they provided us showed that conflict and overlap are also not a major economic burden, although the companies were unable to provide specific cost estimates.

Nevertheless, the examples of regulatory conflict and overlap point to several areas of legitimate concern. For one, companies believe that costs and sanctions increase when compliance with one requirement brings them under the jurisdiction of another. The effects of interacting requirements are not now considered during the analysis and evaluation of new rules.

Companies also expressed their frustrations about costs associated with two agencies having requirements for the same product, substance, or process. Agencies explained why overlapping jurisdictions occur and stated that they try to minimize their adverse effects with interagency agreements. In over half of the examples, however, the agencies agreed that the companies had some basis for their concern.

The companies said they were troubled by duplicate enforcement when two or more agencies have responsibilities for investigating discrimination complaints, issuing permits, or conducting inspections. Most of their examples entailed the activities of both Federal and State regulatory agencies. Federal agencies said they are making progress in solving the duplication problem by relying more on State decisions.

CHAPTER 3

THE SOURCES OF REGULATORY

CONFLICT AND OVERLAP

Regulatory conflict and overlap have three origins--the authorizing legislation, the means by which agencies exercise their regulatory authority, and the regulatory authority that is exercised jointly by Federal and State governments. The statutory cause includes single-purpose legislation that fails to consider competing national goals, delegation of authority so broad that it fails to establish clear jurisdictions, and procedural requirements so specific that they hamper opportunities for regulatory agencies to work closely together.

Despite statutory impediments, most regulatory agencies have great flexibility in resolving many conflict and overlap issues. Until recently, however, they have done little to coordinate their rulemaking or to work with the private sector in identifying problems. Federal and State governments share rulemaking and enforcement responsibilities, but they too have not worked as closely together as they could.

Research completed since 1977 highlights some of the same concerns about regulatory conflict and overlap. Nine studies by a variety of governmental and private organizations have cited examples and identified sources of conflicting and overlapping regulations, some of which parallel cases we identified in our survey. ^{1/} In this chapter, we examine the three sources of conflict and overlap and discuss some of the remedies that have been suggested.

^{1/}Domestic Council Review Group on Regulatory Reform, "Challenge of Regulatory Reform," January 1977; Senate Committee on Governmental Affairs, Study on Federal Regulation. Vol. V. Regulatory Organization, 95th Cong., 2d Sess., December 1977; Joint Economic Committee, An Inquiry into Conflicting and Duplicative Regulatory Requirements Affecting Selected Industries and Sectors, Congressional Research Service, July 1980; Office of Management and Budget, "Improving Government Regulations: Current Status and Future Directions," November 1980; U.S. Regulatory Council, "Regulatory Reform Highlights," 1980; U.S. Regulatory Council, "Innovative Regulatory Techniques," 1980; U.S. Regulatory Council, "Cooperation and Conflict: Regulating Coal Production," January 1981; American Bar Association, "Federal Regulation: Roads to Reform," 1979; The Conference Board, "Regulatory Problems and Regulatory Reform: The Perceptions of Business," 1980.

STATUTORY SOURCES

Conflicting national goals

Policy goals in a complex industrial society may be compatible and even complementary--as when government strives for both energy conservation and environmental protection by relying less on automobiles. These goals inevitably conflict with other, equally legitimate ones--relying less on automobiles may also mean economic decline or industrial dislocation. It is virtually impossible for the Congress not to enact laws whose goals will not compete with other goals previously enacted into law.

In the very best of cases, agencies promulgating regulations to implement one law will coordinate their actions closely with agencies charged with implementing a competing law. The regulated entities then simply comply with a policy that is a compromise among diverse legitimate social needs. At worst, regulatory agencies do not coordinate with each other or their regulations do not allow the regulated entities sufficient flexibility, and compliance costs rise. In this report, we cannot determine the overall mix of best and worst cases, though we believe there is one.

Competition between national energy and environmental objectives provides a common example of regulatory conflict, as we saw in chapter 2. For instance, under the Fuel Use Act, DOE seeks to decrease the use of oil and gas by encouraging the use of alternative energy sources. Coal represents 90 percent of the Nation's fossil fuel reserves and is more readily available than unconventional energy sources, but to burn it companies must comply with standards administered by EPA under the Clean Air Act as amended. Complying with the one statute may increase the difficulty and the cost of complying with the other. DOE and EPA implement competing legal authorizations, and the private sector has the burden of resolving the conflict.

In our sample of company concerns, one company had invested more than \$50,000 in preparing applications for an environmental permit that EPA had yet to act on. Were EPA to deny the permit, the company would then have to request an exemption from DOE's requirements. The company expressed frustration about the delays, the administrative costs, and the consequent uncertainty about whether to plan for coal or oil-fired boilers.

The Congressional Research Service in surveying eight major industries and sectors found several examples of perceived regulatory conflict that were traced to competing legislative mandates. Auto industry officials identified congressional efforts to lower fuel consumption, reduce auto emission pollution, and increase automobile safety as difficult to meet simultaneously because they have conflicting consequences. The industry contends, for example, that emission control devices and safety devices tend

to increase vehicle weight, which in turn increases fuel consumption. 1/

Imprecise mandates and overlapping jurisdictions

Broadly stated mandates given to several agencies are another source of conflicting and overlapping regulations. They are sometimes justified as protection against gaps in regulatory coverage. Their disadvantage is that they do not establish adequately precise jurisdictions for agencies that must enforce statutes with closely related objectives. The resulting competition over regulatory turf wastes regulatory resources and imposes additional costs on the private sector.

For example, in 1977 13 separate laws gave 4 agencies-- Consumer Products Safety Commission, Environmental Protection Agency, Food and Drug Administration, and Occupational Safety and Health Administration--varying degrees of authority over matters of health and safety. On the surface, the 5 agencies appear to have separate and distinct missions; in practice, their jurisdictions overlap. The Senate Committee on Governmental Affairs noted that the Congress provided little guidance for delineating responsibilities or coordinating new laws and programs with existing ones. 2/ One result was initial uncertainty about how CPSC, EPA, and FDA were to regulate chlorofluorocarbons, although these agencies later jointly developed a common approach. Similarly, authority shared among the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Comptroller of the Currency has created confusion in their banking functions. How FDA and USDA should jointly regulate food provides another example.

The American Bar Association traces overlapping jurisdictions to the practice of creating a separate agency to tackle new problems that were sometimes only extensions of older problems already entrusted to an existing agency. 3/ It cites the delegation of equal employment opportunity responsibilities to the Equal Employment Opportunity Commission and the Departments of Justice, Labor, and Health, Education, and Welfare (Departments of Education and Health and Human Services). In another example, the ABA identified 16 Federal regulatory agencies with responsibilities that directly affect the price and supply of energy despite the consolidation of energy functions in the Department of Energy.

1/Joint Economic Committee, p. 2.

2/Senate Committee on Governmental Affairs, p. 86.

3/American Bar Association, p. 70.

Restrictions on procedural flexibility

Statutes may, conversely, restrict opportunities for regulatory agencies to reduce conflict and overlap. In regulating asbestos, for example, CPSC and EPA solicit similar information from the private sector, but CPSC is prevented from sharing its information with EPA by the Consumer Product Safety Act (Public Law 92-573), which seeks to preserve confidentiality. Until recently, companies could potentially be required to submit reports to both agencies even though the requirements were similar. CPSC and EPA, however, are now asking companies to authorize CPSC to share information with EPA.

Statutory restrictions may also inhibit joint rulemaking, as when regulatory decisions subject to different review standards lead to differences in how agencies develop and support their rules. For example, agency judgments in CPSC, OSHA, and certain FDA regulations issued through formal rulemaking are sustained if they are supported by "substantial evidence." FDA rules on food and color additives, however, must be backed by fair evaluations of the entire record, while rules on other subjects developed in informal proceedings must be backed by a judicial finding that the agency was not arbitrary or capricious. The differences in these review standards have hampered CPSC, OSHA, and FDA from jointly developing new rules in areas of mutual jurisdiction.

SOURCES IN REGULATORY DEVELOPMENT AND IMPLEMENTATION

Poor coordination among agencies

Despite the constraints of competing legislative objectives and overlapping jurisdictions, regulatory agencies retain considerable flexibility to establish clear jurisdictional boundaries without legislative changes. The Senate Committee on Governmental Affairs noted in its 1977 report that waste and duplication could be prevented by improving agency coordination. ^{1/} The Committee concluded that, rather than a radical restructuring of agencies, what is needed is some reordering of independent regulatory commissions as well as greater effort by the Congress to rationalize and consolidate imprecise mandates.

At the same time, however, that Committee and the Domestic Council Review Group concluded that regulatory agencies do a poor job of coordinating during rulemaking. This attitude was shared by the Office of Management and Budget, which pointed out in its 1979 status report on the implementation of Executive Order 12044 that in most agencies no management systems existed

^{1/}Senate Committee on Governmental Affairs, p. 2.

to coordinate regulatory decisionmaking before 1978. In its 1979 report, the American Bar Association added that

Under powers delegated by statute, regulatory agencies make important choices among these competing and conflicting economic and social goals. Because our regulatory agencies are numerous, oriented to a single mission, and often independent of the President, their activities are not subject to effective control. Each agency's actions affect a wide range of interests other than the single mission they are primarily charged with performing, but few mechanisms exist for coordinating their actions with those of other agencies and departments. 1/

The American Bar Association and the Senate Committee on Governmental Affairs both suggested that the President be given additional authority to hold agency heads more accountable for regulatory management and coordination, including independent agencies. Both stated that this would improve interagency cooperation in developing and implementing rules. Improved coordination among regulatory agencies as well as centralized control of the regulatory process are objectives of the Reagan Administration's regulatory relief program.

The examples we categorized as cases of overlapping jurisdictions tend to support the need for more coordination among regulatory agencies. For example, one result of EPA, DOT, and OSHA having different requirements for defining, labeling, and handling "toxic," "highly toxic," and "poisonous" substances is that some substances are labeled as a poison during storage but handled as nonpoisons during shipping (example 34). These agencies believe that the distinctions are appropriate because the classifications serve different purposes, but they concede that more coordination is needed. In 1980, the Interagency Regulatory Liaison Group established a task force on labeling standards to work on this issue, but no decision had been reached at the time we drafted this report.

Poor coordination within agencies

According to the Office of Management and Budget, failure to consider the cumulative effect of regulations within individual agencies increases conflict and overlap of rules. Allowing rules to be written at the bottom of an agency without coordination with its top reduces accountability. It also results in rules being narrowly focused.

A former Deputy Administrator of EPA has described, for example, how proposals to build a major new plant may be given

1/American Bar Association, p. 9.

separate and duplicate reviews by the same agency to meet requirements of the Clean Air Act. Most State implementation plans under the Act require a review of new plant construction to insure that it will meet new pollution source performance standards, but 1977 amendments to the Act allow a separate review, to prevent significant deterioration in areas of the country that are currently cleaner than air quality standards demand. ^{1/} The law allows that the reviews for prevention of significant deterioration can be delegated to the States, but only 17 States had been granted this responsibility by May 1981. Thus, most companies undergo two separate reviews, one by the State and one by EPA but both under the purview of EPA.

Additionally, since the definition of clean air differs with individual pollutants, new plants may be in a clean area with regard to one pollutant, such as sulfur dioxide, while being in violation of air quality standards from another, such as photochemical oxidants. This triggers reviews by both the State, which in most cases is responsible for reviewing areas of excessive pollution, and EPA, which is generally responsible for reviewing plants being constructed in areas where the air is clean. Two respondents to our survey expressed concern about multiple reviews under the Clean Air Act (example 35).

Unfavorable company perceptions of poor Federal coordination

The Conference Board and the American Bar Association criticize the adversarial relation of the regulators to the regulated. Writing rules when communication between regulatory agencies and the private sector is poor leads to conflict over methods of compliance. This issue is sensitive, however, because public interest groups typically oppose informal consultations between agencies and industries in the belief that an agency's objectivity may be compromised. They point out, for example, that Federal "sunshine" laws like the Federal Advisory Committee Act and the Freedom of Information Act were written to insure that agency-industry consultations become part of the public record.

A soap and cosmetics company supplied us with an example of companies' perceptions of poor coordination in agencies' developing new regulations. In proposing amendments to test standards for toxic substances, EPA required that toxicity studies be supervised only by board-certified or board-eligible pathologists; that is, people who had been supervising such studies under similar FDA requirements would no longer be eligible (44 F.R. 27334 (1979)). The company's major concern was that EPA

^{1/}John Quarles, "Federal Regulation of New Industrial Plants," January 1979.

would not be convinced that the number of eligible pathologists was too small to implement the proposed requirement. The company said it was frustrated trying to determine EPA's rationale for writing the rule in this way. The proposed rule had not been made final as of June 1981.

Poor interagency communication during rulemaking and enforcement contribute to the unfavorable perception private industries have of Federal regulations. Two companies we interviewed believed it inappropriate that they spend their resources to tell one Federal agency that it should coordinate with another in proposing regulations. They said they believe agencies should resolve inconsistencies with other agencies' rules before notices are published in the Federal Register. Agencies and OMB are making considerable progress in providing this kind of coordination, by using advance agendas, as we discuss in chapter 4.

SOURCES IN FEDERAL AND STATE REGULATORY DUPLICATION

Where Federal and State Governments share regulatory responsibilities, conflict and overlap between their agencies can arise in four ways. Coordination may be poor in developing new rules and enforcing existing ones when Federal legislation establishes minimum rather than uniform standards. Rules and their enforcement may conflict when States act as enforcement agents for the Federal Government. Conflict and overlap may occur when States retain their authority to act independently of the Federal Government in the same program area. Lack of intergovernmental communication during Federal rulemaking may produce duplicate rules.

Different Federal and State standards

The 1970 and 1977 amendments to the Clean Air Act authorize EPA to set minimum air quality standards that State implementation plans must meet. State and local regulatory authorities, however, may exceed the standards and impose standards not prohibited by the Federal law. Sometimes the multiple standards are inconsistent. For example, some States use standards that are not based on technological definitions when they formulate a rule, as in the requirement of "no visible emissions" for controlling air pollutants. Such standards are difficult to reconcile with Federal standards when these are based on technological definitions, as concentrations of controlled emissions are. 1/

1/Joint Economic Committee, p. 13.

When States establish, for products marketed nationwide, standards that are stricter than a Federally established minimum, companies must adjust to the requirements of every State in which they sell their goods. One company in our survey said that California's strict testing and registration procedures delayed its ability to market new pesticides there. The company also questioned the State's need to conduct its own certification for a product that had already been approved by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (example 43). EPA responded that the Act does not preclude States from conducting their own pesticide investigations. EPA added that State data reviews may not be simply duplicates of Federal reviews, because each State approaches existing data in its own way.

The effect of inconsistencies between State regulations on interstate commerce is illustrated by the different weight limits on large trucks. In a report on excessive truck weights, we found that weight requirements in some States are lower than the Federal maximum limit. The stricter limits in these States mean that interstate trucks can carry only the lowest weight allowed by the States they will travel through, have to route their loads around States with low weight limits, or have to violate the standards. Many drivers choose to violate the standards. 1/

Consistent rules may be administered differently, according to the Congressional Research Service. 2/ Company officials have stated that interpretations differ because the attitudes of Federal regional administrators and State and local officials differ. For example, the Regulatory Council's coal study traced several instances of conflict to differences in the way various inspectors interpreted regulations at mine sites. In one case, a mine operator reported an apparent conflict between requirements of the Federal Mine Safety and Health Administration and the State in controlling coal dust in an underground mine. 3/ Because of the apparent conflict, the operator treated the mine shaft with rock dust, turning the walls white, when the Federal inspector was coming and then watered them down, turning them gray, when the State inspector was expected. The Regulatory Council's investigation of this case found not that there was a conflict in the requirements but that the inspectors were using their own interpretations of the requirements when they enforced them.

1/"Excessive Truck Weight: An Expensive Burden We Can No Longer Support," U.S. General Accounting Office, CED-79-94, July 16, 1979, p. 45.

2/Joint Economic Committee, p. 14.

3/U.S. Regulatory Council, "Cooperation and Conflict: Regulating Coal Production," January 1981, pp. 36 and 52.

Duplicate enforcement of Federal standards

When State agencies assume responsibilities for implementing and enforcing Federal standards, the Federal agencies retain responsibility for meeting national program goals. Businesses and industries have alleged that in monitoring State enforcement, Federal agencies duplicate State reviews of permit applications and inspections and conduct parallel investigations of discrimination complaints.

For example, four companies in our survey complained of duplicate Federal and State inspections during the period when OSHA transfers enforcement responsibilities to the States (example 38). OSHA replied that there may be some duplication early in the transition but generally did not agree about the seriousness of the problem. Nevertheless, an official of one of the companies told us that duplicate OSHA and State inspections have been a problem in Virginia since 1972. Both companies believe that the duplicate inspections they have experienced in several States reflect OSHA's dissatisfaction with these States' enforcement efforts.

Duplication from concurrent Federal and State regulation

Duplicate reviews of permit applications and duplicate inspections may also occur when State regulatory authorities retain their own regulatory programs instead of implementing a Federal program. In one instance we have already cited, a company complained that separate but duplicate public hearings were held cause the State and EPA both have responsibility for reviewing environmental permit applications (example 46). This delayed consideration of the company's permit by about 2 months. The State based its review on its own law, not on the Federal program. Similarly, the concurrent authority of EPA and another State in issuing permits under Federal and State water pollution statutes necessitated negotiations to resolve the criteria of differences and, consequently, an extensive commitment of labor and travel costs (example 36).

Limited State and local participation in Federal rulemaking

Duplication between Federal and State regulatory programs results partly from the limited participation of State and local officials in Federal rulemaking. One reason for this may reside in Federal sunshine legislation, which also curtails participation by the private sector. Public interest groups representing State and local governments say, for example, that the Federal Advisory Committee Act discourages intergovernmental coordination of proposed regulations. The Act is designed to insure that Federal agency deliberations remain open for public view, but its critics contend that its requirements for chartering advisory groups formally, assembling committee members who will represent

balanced opinions, keeping detailed minutes, and publishing advance notices of meetings impede informal intergovernmental relations.

An OMB report concluded that implementing the Federal Advisory Committee Act has had many unintended results. In some cases, agencies have set up consulting mechanisms that circumvent the requirements of the Act. In other cases, some agencies that conform strictly to its requirements consult less frequently with the public than the agencies believe is desirable. 1/

1/Office of Management and Budget, "Improving Government Regulations: General Status and Future Directions," November 1980, p. 80.

CHAPTER 4

FEDERAL EFFORTS TO REDUCE

CONFLICTING AND OVERLAPPING REGULATIONS

Congressional, presidential, and agency initiatives to resolve the problems of conflicting and overlapping regulations have concentrated on improving regulatory management rather than on structurally realigning agency responsibilities. The Congress has addressed some of the statutory sources of conflict and overlap we discussed in chapter 3 by considering proposals for periodically reviewing regulatory mandates (as in sunset review), analyzing the regulatory effect of new legislation, and delegating regulatory authority more clearly. For the most part, pending congressional regulatory reform would strengthen executive management.

The executive branch has concentrated on regulatory management with efforts to improve agency coordination during rulemaking and to strengthen OMB's oversight. One of the objectives of President Reagan's task force on regulatory relief is to recommend changes to current regulatory legislation in order to reduce regulatory conflict and overlap. While it is too early to assess their effectiveness, we believe these initiatives represent progress in eliminating some of the causes of regulatory conflict and overlap.

CONGRESSIONAL REDUCTION OF CONFLICT AND OVERLAP

Some statutes adopt competing national goals, create overlapping jurisdictions, and constrain agencies' procedural flexibility. The Congress has considered removing statutory impediments from existing laws by increasing congressional oversight, drafting new legislation with greater awareness of potential conflicts and overlaps, and improving management of the regulatory process in the executive branch. Recent proposals favor this last approach.

Removing impediments in existing statutes by increasing congressional oversight

Congressional oversight is not specifically aimed at reducing regulatory conflict and overlap, but it does provide a means of discussing the pertinent issues. Oversight procedures include annual reviews of funding requests, periodic reviews of program authorizations, special purpose hearings, staff studies, reviews by the General Accounting Office and other support agencies, and less formal investigations. 1/

1/See our report "Observations on Oversight Reform," U.S. General Accounting Office, PAD-81-17, March 1981, for more detail.

One oversight technique that bears more directly on regulatory conflict and overlap is periodic reauthorization of regulatory programs. Currently, a number of agencies are subject to periodic reauthorization of their funding, and there have been proposals to apply this sunset concept to all regulatory agencies. The hearings that accompany this reauthorization process give the Congress a good opportunity to scrutinize the mission of agencies. Congressional sunset reviews of all programs in a policy area, regulatory and nonregulatory, tend to reinforce the consideration of alternatives for achieving regulatory goals, however. We believe that regulatory programs can be reviewed more effectively through broad general oversight than through reviews directed at specific regulatory activities.

Improving the drafting of new regulatory legislation

The Congress has made several efforts to improve its drafting procedures in order to reduce conflict and overlap in new legislation. The Senate in the 95th Congress, for instance, adopted a rule requiring Senate committees (except the Committee on Appropriations) to include a regulatory impact evaluation with their reports on each public bill and joint resolution. ^{1/} The committee evaluation reports must show the economic effect of the proposed regulation, the individuals and businesses that will be regulated, the effects on the personal privacy of those who will be regulated, and the paperwork requirements. A committee that does not submit an evaluation must submit in its place a statement explaining why it did not comply with the rule. Committee impact evaluations can help protect against the statutory sources of conflict and overlap, but it is too early to determine whether committees will use the rule for this purpose.

The Congress has also tried to insure clear delegations of authority in drafting new legislation. According to the Senate Committee on Governmental Affairs, the Toxic Substances Control Act (Public Law 94-469) is an example of success. The Act designates EPA as the "lead" agency for developing rules governing toxic substances, whereas before the Act, 5 Federal agencies or departments administered at least 13 statutes in controlling chemicals. The Act allows other agencies the first option in promulgating regulatory action but authorizes EPA to prompt other agencies into action and to impose regulatory controls on its own. Allowing one agency in this way to pre-empt automatically a regulatory jurisdiction reduces the possibilities

^{1/}Rule 29.5, renumbered rule 26.11(b) in the 97th Congress.
See our report "A Technical Guide to Assessing and Preparing Economic Impact Analyses of Regulatory Legislation," U.S. General Accounting Office, PAD-81-03, December 1980, in which we discuss the requirements of Senate rule 27.6.

of conflict and duplication in a particular area and gives agencies some guidance about their responsibilities.

Improving executive branch regulatory management

Some people believe that the executive branch should have more authority to reduce conflict and overlap. For instance, the American Bar Association favors instituting the following presidential authorities:

First, the President should have a limited authority to modify or direct certain critical agency actions, subject both to a constitutional form of Congressional Review and to Judicial Review for conformity with the agency's enabling statute.

Second, the President should require agencies to prepare regulatory analyses examining the impact of major regulatory decisions upon other national goals and should have the power to require an inter-agency review of major proposed regulations, under presidential auspices, before such regulations are made final.

Third, because the conventional form of legislation veto over a wide range of agency actions is constitutionally vulnerable, a more limited and constitutionally safer form of congressional review should be restricted to major grants of delegated power to the President. 1/

The Regulatory Flexibility Act (Public Law 96-354) allows executive and independent agencies to be more flexible in developing regulations that apply to small businesses. Agencies are required to analyze the economic effect of proposed rules on small businesses and to identify existing Federal rules that may conflict or overlap with them or duplicate them. Periodic review of existing Federal regulations is also required for identifying conflict, overlap, and duplication with other Federal and with State and local rules.

The 96th Congress considered two comprehensive regulatory reform proposals (H.R. 3263 and S. 262) that would have extended regulatory management requirements to the independent agencies and would also have required periodic reviews of existing rules, preparation of agendas of proposed regulations, and semiannual

1/American Bar Association, "Federal Regulation: Roads to Reform," 1979, p. 9.

publication of a calendar of major rules under development. All these provisions expanded on requirements made of executive agencies under Executive Order 12044. The bills would also have designated an agency (OMB or a regulatory council) as a mediator for regulatory conflict and overlap between agencies and as a help in maintaining overall regulatory management control. Neither proposal was enacted, but the House bill was introduced in the 97th Congress as H.R. 746 and hearings were held in March 1981. In the 97th Congress, regulatory conflict and overlap are also the subject of other proposed legislation, including S. 400, the "Regulatory Conflicts Eliminations Act," and parts of larger regulatory reform efforts such as S. 344, the "Agency Accountability Act."

EXECUTIVE BRANCH REDUCTION OF CONFLICT AND OVERLAP

Since 1977, the executive branch has been increasingly active in reforming regulatory management procedures. Most of the recent pertinent executive branch initiatives aim to reduce the adverse effects of overlapping agency jurisdictions. Executive actions that have helped avoid and reduce regulatory conflict and overlap have involved the White House and OMB in regulatory management and have created the Regulatory Council and interagency coordinating groups. Instituting formal and informal interagency agreements, changes in agency rulemaking mechanisms, and coordinating mechanisms between Federal agencies and State and local governments are others that have also helped. We discuss each in turn.

Involving the White House and OMB in regulatory management

The Reagan Administration's strategy for controlling the regulatory process is embodied in Executive Order 12291, issued in February 1981. It replaces Executive Order 12044, which represented in March 1978 the first comprehensive attempt to manage Federal regulatory processes. Executive Order 12291 establishes more stringent criteria than 12044 did for analyzing costs and benefits before rules can be made final, and it gives OMB greater control over regulatory management. It also places greater emphasis on reviewing existing rules; in monitoring Executive Order 12044, OMB had reported that most agencies had failed to review existing rules. Executive Order 12291 gives overall responsibility for the Administration's regulatory reform program to the Presidential Task Force on Regulatory Relief, which is headed by the Vice President and staffed by OMB.

Several requirements of Executive Order 12044 were aimed at increasing coordination between regulatory agencies to reduce regulatory conflict and overlap. Independent regulatory agencies-- among them the Federal Communications Commission, the Federal Trade

Commission, and the Interstate Commerce Commission--are not directly subject to presidential order. Most complied voluntarily with Executive Order 12044, however, and are expected to do the same with 12291.

The requirements of 12044 included a number of items, as follows:

- Each agency was required to publish a semiannual agenda of all significant, planned rules. "Significant" was determined by taking into account the type and number of individuals and organizations that a rule would affect, the rule's cost (including compliance and reporting burdens), and the rule's relation to other programs and policies. The agendas increased opportunities for public participation and resulted in the creation of a regulatory focal point for coordination with other Federal agencies, State and local governments, and the public. About 2,000 significant rules were issued annually.
- Another requirement, for major rules, was an analysis of alternatives for solving problems and an explanation for choosing one alternative over another. "Major" was defined as having an annual effect on the economy of \$100 million or more or causing substantial change in costs or prices in individual industries, regions, or levels of government. About 150 major rules were issued each year.
- The Order also required reviews of existing regulations. One criterion for selecting rules to review was the need to eliminate overlap and duplication. Agencies themselves determined which regulations they wanted to review.
- The Order also brought agency heads into greater involvement with development and approval of significant new rules.

Executive Order 12291 requires a number of things, including the following:

- Agencies are required to continue publishing semiannual agendas of pending major regulations.
- Analysis of costs and benefits is made a more explicit part of assessing major regulatory actions. For a given action, the benefits must outweigh the costs and chosen alternatives to any given regulatory objective must involve the least net cost to society. OMB may review agency analyses and incorporate its own comments.
- The Order requires agencies to review existing rules periodically and apply standards for cost-benefit analysis that are set forth in the Order. OMB may direct agencies to review specific major regulations if they do not do this on their own initiative.

--OMB also has authority to identify duplicate, overlapping, and conflicting rules and to require interagency coordination to minimize or eliminate them.

Responsibility for insuring that the Order is implemented is placed with OMB's Office of Information and Regulatory Affairs, under the direction of the Presidential Task Force on Regulatory Relief. The Task Force is directed under 12291 to develop legislative proposals to remedy statutory constraints that preclude effective regulatory decisions. Executive Order 12291 is the Reagan Administration's major tool for centralizing regulatory management policy in OMB.

Establishing the Regulatory Council

President Carter established the U.S. Regulatory Council on October 31, 1978, but in March 1981 President Reagan disbanded it and most of its functions were transferred to OMB. Comprising the heads of 36 executive departments and independent agencies, it was created initially to coordinate Federal regulatory activities and to develop improved techniques for regulatory management. Some of its specific objectives were to study the substance of regulations and procedural improvements; coordinate its members' efforts to improve regulatory analysis and to analyze reforms; eliminate conflicts, inconsistencies, and overlaps in existing and proposed rules; study the cumulative effects of regulations on specific industries; and mediate disputes between the Council's members and private industries.

The Council pioneered several studies and techniques that helped its member agencies understand and avoid conflicting and overlapping regulations. In doing this, it examined the effects of cumulative regulations on the coal industry and on hospitals, participated in the development of interagency coordination in regulating carcinogens, and studied alternative forms of regulation and overlap in procedures for permits and licenses.

As a mediator of disputes between member agencies and regulated industries, the Council intervened in several cases of alleged conflicting regulations. In March 1980, the Council intervened between the Chocolate Manufacturers Association and FDA and OSHA in a dispute that had been unresolved since 1975. The Association had claimed that it could not meet both FDA's sanitation standards and OSHA's noise reduction requirements because the particular process for manufacturing chocolate makes it difficult and expensive to control noise while meeting FDA's sanitation requirements. The Council arranged meetings between the participants and tours of two chocolate manufacturing plants to examine the problem firsthand. The problem was still under discussion when the Council was disbanded, but both chocolate industry and Council officials believe the Council helped bring the three parties closer together.

The most visible function of the Council was its semiannual publication of the Calendar of Federal Regulations, containing an

average of 125 proposed regulations. Each issue included a description of all proposed regulations and their analytical bases, the dates on which pertinent action was to take place, and a cross-index of regulatory interrelationships and effects. The publication of the calendar will continue under the auspices of OMB. It is an oversight tool for the Executive Office of the President, the Congress, and agency managers; it also helps citizens participate in identifying potential regulatory conflict and overlap.

Creating interagency coordination committees

The objective of several interagency committees is to improve coordination between regulatory agencies. Each committee is a small group of member agencies representing specific policy interests. Supporters believe the committees are effective because to develop and implement specific solutions, they address substantive issues almost daily.

The Interagency Regulatory Liaison Group

The Interagency Regulatory Liaison Group (IRLG) is one of the most active committees. The agency heads of CPSC, EPA, FDA, and OSHA established it in mid-1977, and they were joined in 1978 by the Food Safety and Quality Service of the Department of Agriculture. The chair rotates semiannually among the members. There is one permanent employee, with other staff performing IRLG duties in addition to their other regular agency responsibilities. The staff attribute the active cooperation among members to their high level of commitment and the informal nature of contacts among the staffs of member agencies. Statutory constraints, however, such as that on sharing information protected by confidentiality clauses, sometimes hamper them.

An impetus for creating the IRLG occurred in 1977, when EPA, FDA, and CPSC met to develop a U.S. position for the International Conference on Fluorocarbons. The agencies decided to continue meeting monthly to address other common problems, and the IRLG evolved. Their most successful completed projects include participation in developing a coordinated document assessing the risks of carcinogens, consistent toxic chemical regulations, and mutually acceptable joint testing guidelines.

To reduce or prevent regulatory conflict and overlap, IRLG has examined alternative means of developing new rules jointly among agencies that have overlapping jurisdictions. To control the use of asbestos, for example, IRLG members intended initially to research jointly the need for asbestos regulations, share their results, conduct joint hearings, and issue a single rule. They concluded, however, that they could not issue one joint rule, because of the different procedural requirements of their authorizing statutes. Nevertheless, they jointly funded research, shared information and expertise, coordinated to avoid duplicate informa-

tion requests from industry, and conducted joint meetings. They also believe that they reduced costs to agencies and regulated companies.

Recently, IRLG has considered instituting joint, cross-over, and referral inspections to reduce duplicate enforcement activities and increase the effectiveness of inspections. A joint inspection is a single inspection of a company by a team of inspectors from the various agencies that have jurisdiction over that company's product or workplace. This method was not widely used because the agencies were subject to different statutory conditions for conducting an inspection. A cross-over inspection allows an inspector from one agency, such as EPA, to be trained and authorized to work as an agent for another agency, such as OSHA. This method could not be used because its legality is questionable and business opposition is strong. An IRLG official stated that business opposition to cross-over inspection stems from a fear of more frequent and comprehensive inspections. A referral inspection allows inspectors from one agency, such as FDA, to be trained in detecting potential violations of the major rules of another agency, such as OSHA. Inspectors for FDA then might notice a major violation, of say, an OSHA noise safety rule, and could refer this to OSHA for follow-up action, although the FDA inspectors have no authority to issue citations or recommend corrective action on OSHA's behalf. Implemented in April 1980, this program is also opposed by businesses, but IRLG members consider it to be a successful cooperative effort.

Another IRLG work group is attempting to develop toxicity testing guidelines for use in generating data that will be acceptable to all the agencies. It has completed four sets of guidelines and is at work on more than a dozen others. A second group is working to develop the elements of joint approaches to the regulation of 27 potentially hazardous substances, including shared research data, regulatory analyses, public hearings, and concurrent and consistent rulemaking.

Other interagency groups

Several other interagency groups have worked to coordinate regulatory activities but not as extensively as IRLG. For example, the Radiation Policy Committee represents 13 Federal agencies currently addressing six issues on the coordination of radiation standards. Additionally, 5 agencies have worked together to adopt a uniform rating system for financial institutions. In addition, EPA, the Department of Commerce, and the Small Business Administration work together to help small businesses meet EPA pollution control requirements.

Instituting Federal interagency agreements

Formal interagency agreements are another means by which regulatory agencies coordinate regulatory policies and delineate jurisdictions. A recent study prepared for EPA reports more than

100 interagency agreements in health, safety, and environmental protection, most of them signed in the past 3 to 4 years.

Some coordinating agreements are required by law. For instance, EPA has been given authority to regulate toxic substances, but a pre-emptive jurisdiction arrangement in the law requires EPA to defer to other regulatory agencies that had already been regulating substances covered by EPA's broad new mandate. To insure adequate coverage and to minimize overlap, EPA has entered into agreements with other agencies.

The EPA study also concluded that the success of an agreement depends more on the issues and the "environment for cooperation" than on the mechanisms and processes used to reach an agreement. Top-level support for an agreement and a willingness among agency heads to cooperate contribute to successful coordination. Statutory and administrative inconsistencies, on the other hand, are less likely to be resolved by agreements. One EPA official referred to the formal requirements in the agreements as "icing on the cake."

Some agencies prefer informal coordination. EPA and OSHA worked informally to establish labeling standards for hazardous substances in the workplace. Under informal agreements, agencies' offices of regulatory coordination are often a focal point in setting up interagency contacts.

Changing agency rulemaking mechanisms

Some agencies have attempted to improve their rulemaking procedures unilaterally. USDA, for example, requires that all proposed rules be analyzed. EPA establishes intra-agency work groups to develop proposed regulations and, when appropriate, includes as members officials from other agencies. Its regulatory development process ends with a review by a top-level committee before the rules are sent to the administrator for final approval.

Most regulatory agencies created separate regulatory management offices to implement the provisions of Executive Order 12044, and these offices have pushed to improve the internal procedures for developing new rules. They have also established guidelines for regulatory analyses, and they serve as the focus for interagency coordination.

Coordinating Federal and State rulemaking and enforcement activities

State and local participation in Federal rulemaking is lacking

Although attempts have been made to increase State and local involvement in rulemaking, progress has been limited. In our report on how States perceive Federal environmental programs, we

found that less than 10 percent of the State respondents to our questionnaire believed EPA gives their viewpoints substantial consideration in rulemaking. ^{1/} In the absence of State and local participation, opportunities to anticipate and prevent regulatory conflicts and overlaps are lost.

One objective of Executive Order 12044 was to insure the existence of opportunities for State and local governments to participate early in the rulemaking process. Recognizing in November 1980 the limited progress that had been made in meeting this objective, OMB reported that it had asked representatives of State and local governments to identify the Federal regulations that carry the greatest compliance burdens. OMB's objectives are to take these into account in scheduling agency sunset reviews and to avoid similar burdens in new rules. OMB plans over the long term to explore ways to improve consultation between Federal, State, and local governments in developing regulations.

We agree with OMB's objectives, but inasmuch as State and local participation is not a stated objective of Executive Order 12291, we question whether they will be met.

Federal and State enforcement
are in transition

Federal and State regulatory agencies have begun to work more closely with each other in enforcing rules, but the private sector continues to see this as an area needing improvement. One reason that businesses perceive Federal and State duplication to be a problem is the disruption that occurs when States assume Federal regulatory responsibilities. During these transition periods, Federal regulators may share responsibilities with States in some areas and monitor States' performance in others, and particular relationships are subject to change and vary from State to State.

The extent to which States have been delegated responsibility to implement and enforce environmental programs varies considerably by program, for example. Under the Clean Air Act, 39 States have been given EPA approval to implement and enforce new source performance standards (under section 111), 34 States implement and enforce national emission standards for hazardous air pollutants (under section 112), and 17 States have authority to issue permits for prevention of significant deterioration (under part C of the Act). Under the Clean Water Act, 33 States have been delegated authority to issue permits for the national pollutant discharge elimination system. Eighteen States have approved hazardous waste management plans under the Resource Conservation and Recovery Act.

^{1/}"Federal-State Environmental Programs--The State Perspective,"
U.S. General Accounting Office, CED-80-106, August 22, 1980.

We have characterized State implementation of environmental programs as erratic, confused, and slow (in "Federal-State Environmental Programs," cited above). Although the reasons are complex, a number of contributors to the problem are clear. They include unrealistic statutory deadlines, uncertain or delayed Federal funding, EPA's issuing regulations later than States need in formulating implementation plans, and EPA's issuing inflexible regulations that prevent States from adapting programs to their own unique characteristics. We have recommended that EPA solicit State participation earlier, when actions that will bear directly on State program implementation are anticipated. We have also recommended that EPA establish joint EPA-State committees to review each program, identify implementation problems, and advise the EPA Administrator. The responses we received to our survey for this report support the argument for greater State participation in resolving implementation issues such as duplicate enforcement.

State enforcements of OSHA standards are also in transition. Federal and State enforcement responsibilities vary by State, including the extent to which Federal and State compliance officers visit the same business firm. As of February 1981, 11 States had submitted development plans to operate their own workplace safety and health programs but had not yet received OSHA approval, and 10 States had received approval of plans under which they share enforcement responsibilities with OSHA. For these 21 States, OSHA may have direct enforcement authority as well as responsibility for monitoring a State's performance. Twelve States have been certified to implement a workplace safety and health plan fully, and in these OSHA monitors State performance. In 17 States, OSHA maintains direct enforcement authority, because the States have decided not to participate in the OSHA program, by either withdrawing or not submitting a plan.

Respondents to this report's survey were concerned primarily with duplicate inspections stemming from OSHA's monitoring of State performance. The House Committee on Appropriations has also expressed concern about OSHA's inspecting worksites or States it had already visited. The Committee restricted such "spot checks" in OSHA's fiscal year 1980 appropriations legislation. OSHA operates at present under a continuing resolution (Public Law 96-536), and the restrictions on spot checks are still in force. In its fiscal year 1981 budget justification, OSHA asked that the restriction be removed on the grounds that it denies the Federal Government an essential State-auditing tool. We agree with OSHA's intention of insuring the high quality of workplace inspections, but we also believe that the concerns companies expressed in our survey demonstrate a need for working closely with States in minimizing unnecessary burdens on business.

EEOC states that it is relying more on State and local fair employment agencies to resolve discrimination complaints. We have supported this assertion in other reports. In 1976, EEOC had been making only limited use of State and local fair employment practices agencies--the agencies had resolved only about 32

percent of the 45,000 charges EEOC referred to them in 1975 and EEOC had accepted only 75 percent of the State and local agency resolutions--but in 1981, we have reported improvements. During 1979, State and local agencies resolved about 53 percent of the charges EEOC referred to them and EEOC accepted the agencies' findings in about 95 percent of the resolutions. We have also noted, however, that EEOC has opportunity to share more of its workload with eligible agencies with which it does not have work-sharing agreements. 1/ Responses from our sample of companies for the present report suggest that duplicate investigation of employment discrimination complaints continues to be a problem for the private sector (example 47).

FDA has relied increasingly on States to inspect feed mills manufacturing medicated feed. The Federal Food, Drug, and Cosmetic Act authorizes FDA officials or their designated agents to enter and inspect most food, drug, and cosmetics establishments, including feed mill plants. FDA has told us that 26 States now inspect feed mills and that State inspections accounted for 86 percent of feed mill inspections in fiscal year 1980. FDA acknowledges, however, that duplication and regulatory conflict can occur in the 24 other States, which do not have contracts with FDA.

1/"The Equal Employment Opportunity Commission Has Made Limited Progress in Eliminating Employment Discrimination," U.S. General Accounting Office, HRD-76-147, September 28, 1976; "Further Improvements Needed in EEOC Enforcement Activities," U.S. General Accounting Office, HRD-81-29, April 9, 1981.

CHAPTER 5

CONCLUSIONS, RECOMMENDATIONS, AND AGENCY COMMENTS AND OUR RESPONSE

CONCLUSIONS

That regulatory requirements conflict and overlap is frequently stated to be a problem, but data we collected for this report do not support the assertion. Responding to our request for examples of burdensome regulatory conflict and overlap, companies in the private sector expressed equal if not greater concern about excessive regulation and failings in the rulemaking process itself. Moreover, the companies we surveyed did not indicate that their conflict and overlap examples are a great economic burden, although precise costs are difficult to assess.

Regulatory agencies have begun to work more closely with each other to prevent and reduce regulatory conflict and overlap. We do not see a need for drastic solutions such as major realignments of agency responsibilities. Improvements are needed in some areas, however. We believe that regulatory conflict and overlap are for the most part resolvable by refining the implementation of Executive Order 12291 and by improving the analysis of regulatory legislation.

Assessing the effects of interacting requirements

Strengthening OMB's oversight of regulatory agencies in the executive branch and attaching greater importance to analyzing the costs and benefits of proposed regulatory actions are among the objectives of Executive Order 12291. As required in Executive Order 12291, analyses of how proposed regulations will affect the private sector should include descriptions of potential and net benefits, potential costs, and alternatives for achieving the same regulatory goals at lower cost. In cooperation with the Task Force on Regulatory Relief, headed by the Vice President, OMB has authority to promulgate uniform standards for these analyses; it also reviews them. Regulatory agencies prepare analyses when they promulgate new rules, review existing rules, and develop legislative proposals for regulation.

The Order lists broad criteria for estimating the costs and benefits of regulations, but these criteria do not explicitly include consideration of the effects we attribute to interacting requirements. The interaction of requirements can and does increase the costs and diminish the ability of companies to comply with them. Because the effects of interacting requirements that are otherwise unrelated may not be directly apparent, they should be made an explicit part of regulatory impact analysis.

Identifying conflict and overlap

Under Executive Order 12291, OMB is responsible for identifying duplicate, overlapping, and conflicting rules. It has authority to require interagency consultation to minimize or eliminate them. The responsibility formerly rested with the U.S. Regulatory Council, which relied on the voluntary cooperation of regulatory agencies in resolving regulatory problems. We agree that there should be one agency responsible for spurring action when regulatory agencies themselves reach an impasse.

What method OMB will use to identify and resolve conflicts and overlaps is not yet clear. We believe, however, that OMB should not rely wholly on the regulatory agencies to identify potential problems. In our review for this report, we found that a number of examples that the business community perceived as unnecessary conflict and overlap problems had not been so perceived by the regulatory agencies. Sector studies by the Regulatory Council on heavily regulated areas such as coal mines, hospitals, and the automobile industry were useful in initiating the dialogue that is necessary to resolve this kind of regulatory issue. OMB should continue to use this technique.

Identifying statutory sources of conflict and overlap

Another responsibility of OMB under Executive Order 12291 is to recommend changes to regulatory legislation in consultation with interested agencies. We find three statutory sources of regulatory conflict and overlap--statutes that fail to resolve competing national goals, statutes that delegate broad and imprecisely defined jurisdictions to regulatory agencies, and statutes that establish procedural requirements that limit the ability of regulatory agencies to work closely together. Regulatory agencies have considerable flexibility to overcome these impediments without legislative change. To the extent that legislative change is needed to remove the statutory origins of regulatory conflict and overlap, however, OMB should be alert to these areas as it reviews regulatory legislation.

Reviewing similar rules concurrently

With Executive Order 12291, the Reagan Administration has greatly emphasized the importance of reviewing existing major rules. We support this. Just as the projected effects of proposed regulations should be analyzed, so also should the current effects of existing major rules be evaluated in light of experience and changing circumstances. At present, several closely related rules establish concurrent requirements for the same product, process, or substance, some of them levied by many Federal agencies at the same time. The effects of closely

related rules can naturally be expected to be interdependent. Therefore, the objective of resolving conflict by weighing the effects of past rules would be better transformed by requiring the simultaneous review of all related rules--both those that are proposed and those that will remain. Concurrent reviews would promote consistency between rules.

Increasing State and local participation
in regulatory coordination

Federal, State, and local regulatory authorities should consult with one another more closely. Undoubtedly the Federal Advisory Committee Act formalizes certain forms of consultation. Nevertheless, we believe OMB should encourage agencies within the constraints of the Act to maximize State and local participation at an early stage in both the rulemaking and the enforcement processes. We believe such participation will be particularly useful in alleviating duplicate enforcement problems.

RECOMMENDATIONS TO THE DIRECTOR
OF THE OFFICE OF MANAGEMENT AND BUDGET

We recommend that, in cooperation with the Task Force on Regulatory Relief and under the authority granted to the U.S. Office of Management and Budget by Executive Order 12291, the Director of OMB

- require regulatory agencies to assess the effects associated with interacting regulatory requirements as part of their procedures to conduct regulatory impact analyses;
- continue to study selected industries to identify and mediate regulatory problems such as conflict and overlap;
- identify and evaluate statutory impediments to regulatory coordination and recommend legislative changes when necessary to allow agencies to work together;
- require regulatory agencies to schedule for concurrent review closely related rules that establish requirements for the same product, process, or substance;

The Director of OMB should also encourage early participation of State and local regulatory authorities in the review of regulatory activities.

IMPROVING CONGRESSIONAL OVERSIGHT

A number of regulatory reform bills being considered by the 97th Congress would strengthen the role of the executive branch in resolving issues such as regulatory conflict and overlap.

Some of these bills, if enacted, would make the requirements of Executive Order 12291 statutory. We believe that the refinements we have recommended in this report for implementing Executive Order 12291 would apply to that legislation.

Reviewing regulatory mandates periodically (as in sunset legislation), analyzing new legislation for its regulatory effect, and delegating clear regulatory authority would improve congressional oversight. Senate rule 26.11(b), which requires Senate committees to prepare regulatory impact analyses of proposed legislation, could be particularly valuable in the ability of the Congress to anticipate and resolve the statutory sources of conflict and overlap that we have identified in this report--namely, statutes that adopt competing national goals, that establish overlapping jurisdictions, and that restrict the procedural flexibility of regulatory agencies.

AGENCY COMMENTS AND OUR RESPONSE

OMB generally concurs with our recommendations and offers three principal suggestions.

First, it suggests that we note the potential role of the Paperwork Reduction Act in reducing regulatory conflict and overlap. OMB officials state that most information collection requirements stem from regulatory agencies and that implementation of the Act could therefore provide a useful opportunity for spotting duplicate activities among regulatory agencies. We agree that the Act provides this opportunity, but we did not cover this area in our review because it is being studied in several other on-going GAO projects.

Second, OMB suggests that we give further discussion to the Regulatory Flexibility Act and the role of regulatory analyses, pursuant to the Act, in avoiding conflict and overlap. We do discuss the Act in this report, but we believe it is still too early to assess its implementation.

Third, OMB suggests that we point out that the Task Force on Regulatory Relief is an on-going effort of the Administration with a major role. We do not believe that we have implied otherwise in this report.



CONFLICT, OVERLAP, AND DUPLICATION EXAMPLESINTERACTING REQUIREMENTSExample 1

At meat processing plants, OSHA requires that floors be kept safe and dry while USDA requires that floors be kept sanitary by periodic washing.

OSHA response

OSHA requires not dry surfaces but only surfaces that are not slippery. Keeping floors sanitary and not slippery admittedly presents problems for employers, but employers are not trying to resolve the problems sincerely. 29 CFR 1910.22(a)(2) states that the floor of every workroom should be clean and, as far as possible, dry. Where wet processes are used, drainage should be maintained, and false floors, platforms, mats, or other dry standing places should be provided where practicable. Employers, however, are not controlling, for example, the kinds of shoes employees may wear on the job. OSHA has worked with USDA to resolve this problem and has identified several types of shoe soles that meet both agencies' requirements.

Company comments

Even where a company and OSHA have agreed on a method to wet clean the floors, overzealous inspectors still comment on the process and sometimes issue citations. One company believes it should not have to spend the time to explain the process to these inspectors.

Example 2

In food and poultry plants, to reduce noise levels OSHA wants engineered controls that necessitate the use of materials that USDA will not accept because they cannot be maintained free of bacteria.

OSHA response

This type of problem does not arise often. If noise cannot be controlled by engineering methods, employees may wear protective equipment (29 CFR 1910.95). The Occupational Health and Safety Act of 1970 requires OSHA to consider and then determine whether engineering methods are feasible and acceptable. To this end, OSHA provides waivers to companies attempting experimental techniques and will sponsor research feasibility studies that have industry-wide application.

Company comments

One company opposed, on the grounds of cost, an engineered solution that OSHA claimed was feasible. The company constructed

noise baffles instead of issuing personal protective equipment. The supplier of the baffles, however, refused to divulge their chemical composition and, as a result, the company was unable to satisfy USDA that the material was not toxic. This problem was resolved by locating another supplier.

Example 3

OSHA and the National Institute for Occupational Safety and Health (NIOSH) have access to confidential employee medical records with or without employees' consent. The OSHA regulations violate the spirit of "privacy" statutes. Also, under Office of Federal Contract Compliance Program (OFCCP) regulations, employers have confidentiality obligations to handicapped employees.

OSHA response

OSHA officials have never seen a problem arise between agencies over medical records. The Occupational Safety and Health Act of 1970 specifically states that employers can make the medical records of their employees available only with the permission of the employees (29 CFR 19.13, OSHA access to records; 29 CFR 19.20, employee access). Conflict and overlap are not an issue in this example because of the built-in regulatory mechanisms.

Example 4

Regulations implementing Executive Order 11246 conflict with the Order itself and with the 1964 Civil Rights Act. The regulations have caused two companies to turn affirmative action programs into quota systems in violation of the Civil Rights Act.

EEOC response

A number of commentators on EEOC's Proposed Guidelines on Affirmative and/or Remedial Action, published December 28, 1977 (42 F.R. 64826), misunderstood the relationship between the proposed Guidelines and Executive Order 11246. EEOC attempted to remove the causes of this misunderstanding in the final Guidelines on Affirmative Action (44 F.R. 4422, January 19, 1979) by clarifying the Guidelines and by emphasizing that "action taken pursuant to, and in conformity with the Executive Order, as amended, and its implementing regulations, does not violate Title VII." The final Guidelines on Affirmative Action reflect EEOC's "harmonizing the need to eliminate and prevent discrimination and to correct the effects of prior discrimination with the need to protect all individuals from discrimination on the basis of race, color, religion, sex, or national origin." An affirmative action plan or program established in conformity with the Guidelines must contain a reasonable self-analysis, a reasonable basis for concluding that action is appropriate, and reasonable action to correct the situation (29 CFR 1608.4).

When EEOC analyzes the reasonableness of a particular affirmative action plan or program, it considers the following questions. Is the plan or program tailored to solve the problems that were identified in the self-analysis and to insure that employment systems will operate fairly in the future while avoiding unnecessary restrictions on opportunities for the work force as a whole? Will the race, sex, and national origin provisions of the plan or program be maintained only as long as necessary to achieve these objectives? Are the goals and timetables of the plan or program reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse effects or disparate treatment, the availability of basically qualified or qualifiable applicants, and the expected number of available employment opportunities?

The Uniform Guidelines on Employee Selection Procedures, drafted and adopted by four members of the Equal Employment Opportunity Coordinating Council--EEOC, the Civil Service Commission (now the Office of Personnel Management), the Department of Justice, and the Department of Labor--stand as a Federal policy statement on quotas. The Guidelines state that

The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. . . . Accordingly, the Council has not attempted to set forth here either the minimum or the maximum voluntary steps that employers must take to deal with their respective situations. (43 F.R. 38290, August 25, 1978)

(Section 6 of Reorganization Plan No. 1 of 1978 (43 F.R. 19807) transferred the functions of the Council to EEOC.) It is thus made clear that affirmative action is not a system of quotas. Indeed, there are no references to quotas in title VII, and the language in section 703(j) of title VII specifically prohibits "preferential treatment."

Example 5

EEOC prevents employers from asking questions about applicants' nationality, age, religion, and sex but OFCCP requires employers to keep records that show whether each company's work force represents the available work force in the area.

EEOC response

EEOC has no general guideline prohibiting these kinds of questions, but a provision within its guidelines on discrimination because of sex expressly prohibits making inquiry that "expresses directly or indirectly any limitation, specification, or discrimination as to sex" unless the inquiry is based on a bona fide occupational qualification (29 CFR 1604.7). Both EEOC

and OFCCP have two sets of data-gathering requirements that generate data on race and sex--one on the requirements of the Uniform Guidelines and one on recordkeeping requirements under Executive Order 11246 and title VII of the Civil Rights Act. The sets are similar but have been coordinated in a 1978 interagency agreement between EEOC and OFCCP, and this will avoid duplicate recordkeeping.

Example 6

A Department of Labor (DOL) apprenticeship program excludes applicants who are older than 28 years of age, but EEOC challenged the program. Companies cannot place women and minorities who are older than 28 in the program even though the age limit seems irrelevant and even though women and minorities have suffered the most from inability to enter such programs.

EEOC response

Reorganization Act No. 1 of 1978 (5 U.S.C. Appendix, Supp. III (1979)) transferred the authority for enforcing the Age Discrimination in Employment Act (29 U.S.C. 621-634) from DOL to EEOC. On January 13, 1981, EEOC considered the apprenticeship program age exemption and voted 2 to 2 on a motion to delete the exemption. The DOL apprenticeship program does not set a maximum age but permits apprenticeship programs to set one under this exemption.

Example 7

EEOC goals to hire women and minorities conflict with veterans' preference requirements.

EEOC response

Goals to hire women and minorities must be consistent with veterans' preference requirements. Therefore, even employers with affirmative action obligations must take veterans' preference requirements into account when attempting to meet goals and timetables. The EEOC authorizing legislation states that EEOC will uphold veterans' preference (Civil Rights Act, sec. 712).

The Office of Personnel Management is required to grant veterans' preference for jobs in the Federal Government and in many State and local jurisdictions. Preference is also granted by State laws. Enforcement in the private sector extends only to Federal contractors monitored by OFCCP and relates to Vietnam veterans (Veterans Re-adjustment Act, sec. 402). The private sector does not perceive veterans' preference as a major problem, according to a recent survey of business entitled "Myths and Realities: A Study of Attitudes Toward Vietnam Era Veterans," U.S. Senate Committee on Veteran's Affairs, 96th Cong., 2d Sess. (July 1980).

Example 8

Federal Motor Carrier Safety regulations of the Department of Transportation require that motor vehicle drivers be 21 years of age or older and require that each application to drive a motor vehicle include the applicant's birthdate. If an application includes questions about age, EEOC and OFCCP regulations may require the employer to prove that age has not been a reason for rejecting a job applicant. Some States prohibit employers from asking about the birthdate of applicants.

EEOC response

The issue does not apply to EEOC because it is authorized to consider age discrimination only against people who are 40 years old or older.

Company comments

The company is concerned about its liability if it rejects applicants who are 40 years old or older. One company tries to reduce its liability by adding a statement to applications that information on age is solicited to satisfy a DOT requirement.

Example 9

One company litigated an OSHA requirement that retail meat cutters wear mesh gloves, because the requirement appeared to conflict with USDA sanitation standards. The company also believed that mesh gloves imposed a new requirement on the company for a retail job although the rule was for wholesale establishments. The company was successful in overturning the requirement.

OSHA response

OSHA does require the use of personal protective equipment, such as mesh gloves, by companies that perform certain meat cutting operations (29 CFR 1910.132). This regulatory conflict, which occurred in about 1974, resulted from an attempt by an inspector to extend the application of the mesh glove requirement to parts of the industry that it had not been intended to cover. Subsequently, OSHA entered into an interagency agreement with USDA about the types of operation in which mesh gloves are acceptable. OSHA also issued to its inspectors a program directive that clearly defines the situations in which mesh gloves are required.

Example 10

Complying with OSHA safety standards for handicapped people, one company refused to allow a deaf mute, who could not hear truck beepers signalling log drops, to work in a lumber yard.

An EEOC complaint that the applicant filed with the State was resolved in favor of the company. The company agreed to give the applicant preference for future openings that did not pose a safety hazard but believes that this type of problem could recur.

OSHA response

Conflict and overlap do not exist in this case, because no standard says that handicapped people cannot work on particular jobs. OSHA might cite a company for hiring a handicapped worker without insuring appropriate safety measures for that worker's special needs.

Example 11

EPA controls coke oven gas emissions into the atmosphere by requiring companies to build sheds to filter gas particulates, but sheds concentrate some of the particulates in work areas, and this conflicts with OSHA rules, which require gas particulates to be eliminated because they are harmful.

EPA and OSHA responses

EPA believes that this example does not accurately state a problem. Sheds are used to assist in capturing gaseous and particulate emissions generated during coke pushing. Since the sheds partly enclose the emission source, the concentration of pollutants in them will increase in some working areas, other things being equal. This tendency can be overcome by increasing the ventilation rates and revising work practices. According to OSHA, filtering and ventilation will cause no problems if the engineering is properly designed.

The industry comment that gave rise to the question cited a new source performance standard (NSPS) for sheds during pushing. In fact, no NSPS was ever proposed or promulgated for this source under section 111 of the Clean Air Act. It was considered and discussed by the National Air Pollution Control Techniques Advisory Committee in 1974, however. Since then, consent decrees have been negotiated with operators of existing coke ovens; some of these require sheds to assist in controlling pushing operations.

EPA understands that OSHA has no objection to the use of sheds if workplace particulates and polycyclic organic matter concentrations are within the limits allowed. EPA also understands that the OSHA standard has been met where sheds are in use. OSHA believes that this particular case is an isolated incident and that the problems the company perceives it has are difficulties it has caused itself and should not be blamed on the agencies. OSHA and EPA concur in the belief that the company's complaint about conflict is unfounded.

Example 12

Under the Powerplant and Industrial Fuel Use Act, DOE prohibits the use of petroleum and natural gas to fuel large boilers. Coal is often the most logical substitute, but it cannot be burned if it violates EPA standards. DOE grants exemptions from prohibitions against oil and gas but only in a complex and drawn-out process. Companies must try first to obtain a permit from EPA; failing that, they must obtain an exemption from DOE. Two companies expressed this concern, one of them having invested more than \$50,000 in preparing and reviewing a permit application that EPA has placed on inactive status.

EPA response

Companies can generally burn coal in compliance with EPA standards. In 1979, existing facilities consumed more than 675 million tons of coal, mostly in compliance with environmental regulations. EPA has also granted permits to numerous new coal-fired facilities, including boilers for 95 utilities. Since 1975, EPA has not issued a final denial to any utility permit applicant under the Prevention of Significant Deterioration program, which covers major new pollution sources. Of the 30 applications pending, 13 are incomplete and cannot be granted without the submission of additional information by the applicants. In some circumstances, environmental compliance is difficult or even impossible, even with good faith efforts; companies may then seek exemptions from Fuel Use Act requirements (under sec. 211(a)(3), 212(a)(1)(C), 212(g)(2)(A), 212(h)(1)(A), 311(a)(3), 312(a)(1)(C), 312(g)(1)(A), or 312(i)). However, such cases represent a small fraction of the total.

The Congress drafted the Fuel Use Act of 1978 partly because it was dissatisfied with the ability of the Energy Supply and Environmental Coordination Act of 1974 to shift fuel use for large boilers away from oil and natural gas. The Congress transferred a greater share of the burden of proof to companies (which have to prove that they cannot use fuels other than oil and gas) and away from the Government (which had had to prove that companies can use alternative fuels).

The Fuel Use Act does not require coal use. It prohibits oil and gas use in specified circumstances. Alternatives to using coal include conservation and using synthetic and nuclear fuels, hydro and solar power, and biomass, wood, and geothermal power.

EPA constantly seeks coordination with DOE on activities related to implementing the Fuel Use Act. Parts of the statute explicitly require one of the two agencies to give notice of certification to the other (secs. 212(g)(2), 212(h)(1), 312(g)(1)(A), 312(i), 405, 602(d)(1)(C), and 701(f)).

Company comments

One company stated that it is irrelevant for EPA to cite the use of coal by utilities as evidence that its regulations do not burden industry. Available pollution control equipment is more suited to large boilers that utilities build, and utilities are guaranteed a rate of return on their investment. The company concurs that fuels other than coal are acceptable under the Act but considers coal to be the only practical substitute for oil and gas.

Example 13

Little progress is made in converting natural gas and oil burning boilers to coal burning boilers because of the red tape of Federal and State environmental concerns and because of industry's hesitance about conversion costs. It is more costly to burn gas and oil than coal in some circumstances.

EPA response

The Energy Supply and Environmental Coordination Act of 1974 authorized the Federal Government to prohibit certain boilers that can burn coal from burning oil or natural gas. This prohibition could become effective only if EPA determined that the boilers could switch fuels in compliance with environmental regulations. Of the 65 plants (141 units) that received proposed prohibition orders, EPA cleared 46 (97 units) for conversion. Thirteen of these plants (26 units) then received final prohibition orders. EPA's analyses show, however, that converting coal-capable electric utility boilers to coal is generally economical, and EPA supports such conversions.

Conversion is impeded by many things. Financial constraints are the most significant among them. Others include public utility ratemaking procedures that are biased in favor of the operating costs associated with continuing to use oil rather than in favor of the returns from the capital costs of conversion. The difficulties of coal transportation, shortages of personnel who are expert in coal use, and local opposition, often expressed in environmental terms, are other impediments. Additionally, some companies hesitate to believe current predictions of the relative costs of oil and coal.

Example 14

Companies interpret FDA's sanitation requirement for impervious, smooth, continuous, and washable surfaces to mean that equipment should be made of stainless steel, but equipment made of stainless steel sometimes exceeds OSHA's noise limitations. For example, one jelly bean manufacturer polishes jelly beans in stainless steel drums. When OSHA required engineered noise controls instead of the personal protective equipment (ear muffs)

that the company preferred, the company was able to successfully engineer noise controls for its plants but at a cost of about \$400,000.

OSHA and FDA responses

OSHA agrees that there is potential for conflict and overlap in this particular kind of case. If noise levels cannot be kept within an acceptable range, in accordance with OSHA regulations, then protective hearing devices may be worn until the matter is corrected by engineering controls (29 CFR 1910.95). OSHA hires consultants to help industries make engineering analyses of equipment and to advise on how to soundproof their installations.

FDA denies that conflict is an issue in this particular case. 21 CFR 110.40 does not require that manufacturers' equipment be made of stainless steel. This regulation, which is a performance rather than a design standard, states that equipment must be cleanable, properly maintained, and suitable for its intended use. The company has misinterpreted the regulation. Stainless steel is traditionally used in such equipment because of its durability.

Example 15

The Drug Enforcement Agency (DEA) expects employers to ask job applicants whether they have criminal records, but EEOC says that rejecting applicants for reasons of arrest and conviction records can have an unlawfully disparate effect on members of minority groups.

EEOC response

Employers may ask job applicants about convictions and may reject any who have had a job-related conviction and for whom the employer evaluates negatively the nature, number, and circumstance of the offense, the time of the conviction, or the employment history or efforts at rehabilitation. EEOC considers charges on this issue case by case. Through its Commission decision process, EEOC has examined the issue of employers inquiring about arrest records and has determined that such questions are discriminatory. EEOC makes a clear distinction between arrest and conviction records. An arrest record is an individual's record of police arrests; a conviction record is an individual's record of convictions after arrest.

DEA only recommends and does not require that companies ask prospective employees about criminal convictions and whether they are currently under formal charge for committing a criminal offense (21 CFR 1301.90). This policy predates EEOC coordination authority under Executive Order 12067 but provides for the need to maintain fair employment practices.

Example 16

No fewer than 26 of the wastes listed in EPA hazardous waste regulations are generated by the proper operation of air and water pollution control devices (40 CFR 261.31, 32). As pollution control devices capture increasingly greater amounts of toxic pollutants, industries must dispose of more and more hazardous waste, in the form of sludge. Under section 111 of the Clean Air Act, EPA must consider the effect of its new source performance standards on environmental elements other than air. EPA's analysis of its glassmelting standard concluded, for example, that solid wastes generated by means of the standard's operation would be negligible. EPA also said that landfill composed of collected particulate would be environmentally acceptable, but the container furnace particulate is soluble and is likely to be classified as hazardous waste.

EPA response

This example does not state a clear issue or problem. Additional information is necessary.

Company comments

The company providing the glassmelting example did not provide additional details.

Example 17

Because OSHA requires workers to wear respirators when they are exposed to hazardous fumes, one company requires that employees be clean shaven to insure a proper seal, but an EEOC inspector told the company that the clean-shaven requirement may be discriminatory.

OSHA and EEOC responses

EEOC believes that requiring the use of some respirator models could be discriminatory for people whose skin conditions preclude shaving. In these cases, it may be that a different kind of respirator, which may be more expensive, can be used. In general, however, a discrimination complaint is groundless if it is not based on gender or race. EEOC has no guidelines on standards on the issue.

OSHA requires the use of respirators to protect workers' health as one interim measure pending the installation of properly engineered equipment (29 CFR 1910.95, 45 F.R. 27396 (June 23, 1980), part III; 29 CFR 1910.134). In cases where respirators are needed, OSHA regulations state that they shall not be worn when beards, sideburns, and the like prevent a good face seal. OSHA admits there could be a conflict in certain situations regarding respirators but such conflicts are treated by the agencies case by case.

Example 18

FDA's good manufacturing practices rules allow companies to use positive pressure ventilation to prevent cross-contamination of drug products during manufacturing, but OSHA opposes the venting of fumes into the workplace.

FDA and OSHA responses

FDA and OSHA do not believe that this situation represents conflicting or overlapping regulations. FDA does not have a position on vented air and is concerned only with the integrity of the product. The company's description of the problem is vague; it sounds like the contaminated air is being vented into another area in which workers are present. OSHA opposes blowing contaminants from one workplace into another and would take action to prevent it. The company could solve the problem by venting the contaminants elsewhere or using high-capacity filters.

Example 19

A job applicant was rejected because he had not passed company tests and he did not have qualifications specified by FDA. The employee complained to EEOC, which ruled that the company's tests and FDA requirements were not valid tests of ability to perform the job. The company hired the applicant but was then cited by FDA for having an unqualified employee.

FDA and EEOC responses

Neither agency was aware of this specific case, but both believe this kind of situation can occur. FDA standards for job qualifications are admittedly quite broad, and their interpretation is left up to individual companies (21 CFR 211.25 and 211.28). FDA does not involve itself with the development of tests or standards and enforces this regulation only to insure that employees meet standards set by companies. FDA does not attempt to justify the adequacy of these standards nor does it require the use of tests.

According to EEOC, under title VII, using tests that are not related to jobs or not validated constitutes job discrimination if it is demonstrated that using tests has had an adverse effect on people who are under title VII's protection. FDA agrees with this position but does not attempt to apply it by analyzing the validity of examinations.

As a general rule, EEOC does not monitor job qualifications developed by other agencies. However, it has made clear in an interagency agreement with four other agencies that there are requirements about the relation of tests to jobs in the Uniform Guidelines on Employee Selection Procedures. It uses these guidelines as a Federal standard whenever it reviews rules proposed by other agencies.

Example 20

Companies trying to keep floors sanitary by washing them with disinfectants, under FDA's good manufacturing practices requirements, conflict with OSHA's requirements for safe, non-slippery work surfaces.

FDA and OSHA responses

FDA believes that 21 CFR 110.35(c)(4) suggests that FDA and OSHA requirements are consistent. FDA believes that the OSHA requirements for safe, nonslippery work surfaces are being misinterpreted. The interpretation should be directed instead toward the materials for the floor itself.

OSHA requires not dry but only nonslippery surfaces. OSHA acknowledges that keeping floors sanitary yet not slippery has presented problems for employers but believes that employers are not trying to resolve the problem sincerely. They are not controlling the kinds of shoes they allow employees to wear on the job, for example. OSHA has worked with FDA to resolve this problem and has identified shoe soles that meet both requirements.

OVERLAPPING JURISDICTIONSExample 21

EPA requires companies to recycle industrial waste water to achieve compliance with mass discharge (pounds per day) limitations, but recycling builds up concentrations that exceed State limitations.

EPA response

Recycling industrial waste water is practiced where it is desirable because of the costs and limited availability of water, advantageous in reducing waste water treatment and disposal costs, or necessary to meet national pollutant discharge elimination system (NPDES) permit conditions. Recycling industrial waste water offers economic as well as environmental advantages. Water consumption can be reduced, and the size of pumps, pipes, and other treatment equipment can also be reduced, so that water flow is smaller. By concentrating pollutants in a much smaller volume, sludge can be removed more efficiently.

Recycling may require that water be treated before it is used again, but this entails only sedimentation, filtration, or cooling. Water is recycled extensively within individual production units in petrochemical and other industries. When water is used for scrubbing organic vapors, it is frequently recycled to recover organic chemicals and pollutants. Other common recovery operations are decantation (to remove floatable oils), distillation (to remove dissolved organics), and filtration (to remove suspended solids). Good design and economy dictate the need to recover usable chemicals and water.

Therefore, requirements for recycling industrial waste water are designed to conserve water and, concomitantly, to concentrate pollutants in the recycled waste water so that they can be removed efficiently and economically as sludges rather than being discharged into waterways or publicly owned treatment works.

Company comments

EPA justifies its recycling requirements but fails to address the problem that the recycling that increases the concentration of pollutants in waste discharges conflicts with State rules.

Example 22

OSHA's emissions standard for sulfur dioxide allows 5.0 parts per million (ppm) in 8 hours as a weighted average while EPA's standard allows only 0.14 ppm in 24 hours as a maximum, yet both standards were based on evaluation of essentially identical toxicological data.

OSHA and EPA responses

Differences in air standards depend on the populations being protected, the kinds of air they are exposed to, and statutory mandates. OSHA, NIOSH, and EPA use all available health data from toxicological, epidemiological, and other studies, but each agency must give greatest weight to the studies that are most relevant to the populations it is protecting. For OSHA, this usually means epidemiological data gathered in occupational settings; for EPA, it means community epidemiological studies. Community studies on the effects of exposure to sulfur dioxide emphasize 24-hour and annual exposures in the presence of particulate matter; occupational studies focus on 8-hour and chronic exposures. The standard that OSHA must enforce is given in 29 CFR 1910.1000 and is 5.00 ppm in an 8-hour day.

EPA has not yet proposed revisions to its sulfur dioxide standard in its ongoing rules revisions, but NIOSH and OSHA have discussed possible changes. In 1974, OSHA proposed to reduce its rule from exposure to 5 ppm to exposure to 2 ppm in a weighted average of a 40-hour week with 10-hour days as a maximum. In May 1977 hearings, the Deputy Director of NIOSH stated that "Studies reported in the last 3 years have shown some chronic effects such as chronic bronchitis and loss of pulmonary function at chronic exposures below the current Federal occupational standard of 5 ppm (133 mg/m) as a time-weighted average (TWA) concentration." At that time, NIOSH recommended that the sulfur dioxide standard be revised to 0.5 ppm with a time-weighted average. In considering the NIOSH recommendations, OSHA must consider whether such levels can be attained in the workplace given available resources and other regulatory needs where health risk is great. Taking all this

largely into consideration, EPA believes that its standard, which is met throughout the country, is not substantially out of line.

Example 23

EPA has declared saccharin to be a hazardous waste under the Resources Conservation and Recovery Act and has assigned it a hazardous waste registration number, but FDA continues to approve saccharin as a food additive. One company estimates that disposing of a barrel of hazardous waste costs about \$50 while disposing of ordinary wastes costs only about 20 cents.

EPA and FDA responses

EPA has declared saccharin a hazardous waste under the Resources Conservation and Recovery Act and has assigned it a hazardous waste identification number because EPA's cancer assessment group believes saccharin causes cancer. Regulations issued under the Act require that saccharin be managed as a hazardous waste only by people who generate more than 1000 kg (which may include saccharin) or accumulate more than 1000 kg of hazardous waste per month. Disposing of saccharin in quantities in excess of 1000 kg may be substantially hazardous to human health and to the environment; listing it as a hazardous waste is therefore justifiable. Few companies generate such large quantities of saccharin as waste, however.

FDA had initiated regulatory actions to removed saccharin from the market. The Congress, however, has acted to prohibit its removal.

Example 24

At least four Federal agencies--CPSC, DOT, EPA, and OSHA--one State agency--the New York Fire Department--and an independent agency--the American National Standards Institute--all have issued regulations and guidelines for classifying and labeling flammable materials. The classifications of what is flammable vary--as in "extremely flammable," "flammable," and "combustible"--and the agencies' labels within these classifications vary.

OSHA and EPA responses

Some overlapping definitions of flammability do exist, but the statement implies that the problem is larger than it actually is. In most cases, the four Federal agencies have quite different jurisdictions. CPSC, for example, regulates consumer products but not pesticides or toxic substances (except when incorporated in a consumer product), which are regulated by the other agencies. The American National Standards Institute is not an agency with authority to label anything; it is a private institute whose standards industry or government may voluntarily adopt. OSHA regulates hazards in the workplace, but it uses

standards developed by the National Fire Prevention Association (29 CFR 1910.106).

Some conflict does occur between DOT's classifications for regulating the transportation of pesticides and toxic substances and EPA's labels for governing the use and disposal of such products. EPA is revising its labeling guidelines to make them consistent with DOT's classifications. The revisions should resolve existing conflicts between DOT and EPA in labeling flammable substances.

Example 25

EPA's hazardous waste management rules require that ignitable wastes be stored at least 50 feet from a facility property line, but OSHA's rules establish distances ranging from 5 to 20 feet.

EPA and OSHA responses

EPA believes that a 50-foot buffer zone is the minimum acceptable for container storage; it is considering an even more stringent requirement. OSHA believes that agency differences in storage distance rules are a matter not of conflict but simply of one agency having stricter guidelines than another. OSHA says that a company adhering to EPA's guidelines would be complying not only with EPA but with OSHA as well.

The National Fire Protection Association standards for outdoor storage of containers require a 50-foot buffer zone. EPA has adopted the 50-foot zone because in some damage cases containers have rocketed 200-300 feet through the air and toxic fumes from fires have threatened surrounding communities.

EPA's and OSHA's regulatory mandates differ substantially, however. OSHA's main concern is with worker health and safety; EPA is responsible for protecting surrounding communities. OSHA says that the whole matter of storage distance for ignitable wastes is scheduled for future review.

Example 26

FDA has stricter testing procedures than USDA for measuring the presence of animal drugs and feed additives in meat and milk. As a result, companies incur additional research expense, require longer development time for animal drugs and feed additives, and encounter agency disagreements.

FDA response

This example is completely incorrect. FDA pre-clears the testing procedures used by USDA by defining all test and applicable standards (Federal Food, Drug, and Cosmetic Act, sec. 512.3 (b)). USDA only enforces FDA's procedures. This division of

duties prevents overlap. The only major differences in testing procedures occur in cases in which carcinogens are suspected. FDA procedures are stricter for suspected carcinogens and research is more expensive because of the Delaney clause in the Act (sec. 512(d)(1)(H)). Substances that are not carcinogenic require less research money and testing procedures that are less vigorous.

Example 27

FDA has approved xanthum gum in foods that people consume directly but not in feed and drinking water that animals consume.

FDA response

Limited doses of xanthum gum have been approved for human consumption (21 CFR 172.695), but approval for human consumption does not mean automatic approval for animal consumption. If approval of xanthum gum for animal usage is desired, it must be tested with a different set of standards to establish the tolerance of the particular animal, and a separate regulation must be issued.

Example 28

FDA has authority over adding medicine to animal feed. One company produces two additives that are given to animals as medicines in their feed but that are also registered as pesticides. When the same substance is considered both a medicine by FDA and a pesticide by EPA, it is EPA's rules that predominate, by mutual agreement between the two agencies. The company believes that the additives are subject to a burdensome array of regulations despite being only a negligible part of the feed business. The company believes that FDA should have authority over all feed additives.

EPA and FDA responses

This example does describe an instance in which EPA and FDA may potentially have overlapping responsibilities, but both agencies have long been familiar with this kind of situation and have worked together closely to prevent regulatory conflicts and double standards. Potential conflicts between the Federal Insecticide, Fungicide, and Rodenticide Act and the Federal Food, Drug, and Cosmetic Act were prevented by a memorandum of understanding signed in 1971. Amendments to the former act passed in 1975 further clarified the agencies' jurisdictions.

No firm must meet parallel sets of FDA and EPA standards when new animal drugs are developed. According to the amendments mentioned above, FDA has sole authority in regulating new animal drugs; the 1971 interagency agreement, amended in 1973, defines jurisdictions over existing drugs. Where ambiguity exists, one agency consults with the other and together they devise a coordi-

nated plan of regulation that will adequately protect the public health and safety under both laws. As applied to the few ambiguous cases that have arisen so far, this case-by-case cooperative regulatory planning has successfully avoided redundant and conflicting regulation. Any member of industry who has any question about the proper regulatory jurisdiction over a proposed product may contact either agency, and a coordinated response will be developed.

Example 29

FDA and FTC appear to have concurrent authority to regulate food advertising. FTC's regulations try to eliminate deceptive advertising. FDA's regulations try to maintain accurate descriptions of container contents in food labeling, under the Food and Drug Act, but in effect they also regulate advertising. For example, meat with protein additives must be labeled in accordance with FDA rules but this affects what can be claimed about the product in advertising it.

FDA response

FDA and FTC do have potential concurrent authority over food labeling but they do not have concurrent authority over food advertising. FDA has been given authority to oversee food product labeling to insure, for instance, that nutritional claims are displayed on certain products and has issued regulations to do so (21 CFR 101.9). FTC's authority stems from its general responsibilities to protect consumers from deceptive claims by producers and its explicit authority over food advertising. For instance, it can require the disclosure of the contents of a product if the absence of disclosure can be deceptive to buyers. To avoid regulatory conflict and overlap, FDA and FTC have an interagency agreement in which FTC has agreed not to assert its jurisdiction in food labeling unless it has FDA approval.

Example 30

In 1971, the terms of resolution of a sex discrimination charge in a consent decree included maintenance of height and weight standards for newly hired employees. The standards have been accepted by OFCCP but rejected by EEOC. In a current case now in court, EEOC has taken the position that the consent decree is not an EEOC guideline.

EEOC response

The positions that EEOC or another agency takes in settling a case reflect the results of negotiations by the parties settling that particular case. As long as the settlement terms are not contrary to law, they will be accepted by the court that has jurisdiction over the parties. It is commonly understood that the parties to such settlements do not see the terms of a consent decree as binding either party in any other forum or at any other

time. When a government agency is involved, they also are understood as not necessarily reflecting the agency's policy on the issues in the case. An agency's policy is reflected only in its rules, regulations, and guidelines.

Example 31

USDA is guided by FDA rules governing packaging materials that come in contact with food. FDA adopts the "barrier layer" concept--only the material that is directly in contact with the food need be of FDA-approved material if it blocks the migration of harmful substances onto the food from the rest of the packaging material. USDA does not acknowledge the barrier layer concept and requires that the total construction of the package not contain harmful materials.

USDA and FDA responses

USDA does abide by the barrier layer concept of FDA (21 CFR 175.300), but its own requirements (9 CFR 301.2(aa)(6)) are stricter in order to insure that the packaging material is not handled in a way that would transfer harmful substances from the outside to the inside, as might happen in stacking freshly printed labels, for example. USDA therefore encourages packagers to make the total package free of harmful substances, but it does this only for meat and poultry products. No specific USDA regulation sets forth this requirement; instead, USDA acts under the general inspection clauses of the Federal Meat Inspection Act (21 U.S.C. 603) and the Poultry Products Inspection Act (21 U.S.C. 455). USDA and FDA cooperate closely in this area, but USDA acknowledges the need for further coordination.

Example 32

The Bureau of Alcohol, Tobacco, and Firearms (BATF) is the lead agency for controlling the packaging and labeling of alcoholic beverages. FDA is also involved in labeling alcoholic beverages and is forcing BATF to consider putting label warnings on alcoholic beverages because they are a special kind of food.

FDA response

The Federal Food, Drug, and Cosmetic Act requires that FDA insure that the ingredients of nonstandardized food products be listed on the products' labels. FDA delegated its authority for labeling alcoholic products to BATF through an interagency agreement. When BATF did not enforce new FDA labeling standards, FDA attempted to assert its original jurisdiction. However, a Federal District Court in Kentucky enjoined FDA against asserting its jurisdiction on the grounds that BATF's legislation gives it exclusive jurisdiction over labeling of alcoholic beverages. The decision was not appealed and, therefore, this example is not a problem.

Example 33

Jars and lids can be "food additives" under FDA rules. They can also be consumer products under the Consumer Products Safety Act (15 U.S.C. 2051-2082) or hazardous substances under the Federal Hazardous Substances Act of 1960 (Public Law 86-613). Moreover, jars and lids as consumer packaging can also be consumer commodities under one FTC rule (Fair Packaging and Labeling Act, 14 U.S.C. 1451-1461), and lettering on jars and lids can be consumer warranties under another FTC rule (Magnuson-Moss Warranty Act, Public Law 93-637).

FDA response

Authority over handling jars and lids involves both overlapping laws and lack of jurisdiction. Commercial canning comes clearly under FDA authority, except that USDA is principally responsible for regulating most meat and poultry canning. However, home canning is not covered under the Federal Food, Drug, and Cosmetic Act, and FDA officials would prefer to stay out of this area altogether. CPSC also believes that it lacks the authority to regulate home canning lids and jars. FTC has jurisdiction on home canning lids and jars only when consumers register complaints (as in lids not fitting right). Although the three agencies have met, no progress has been reported.

Example 34

Definitions of "toxic" and "highly toxic" are inconsistent with the definition of "poison." As a result, some substances are classified as poison in storage and handling but not as poison in shipping.

EPA and OSHA responses

The statement presumably refers to differences between EPA's four categories of toxicity for pesticides and DOT's requirements for labeling shipping containers of pesticides and other toxic chemicals. EPA's position on the rules can best be clarified by explaining the differences between EPA and DOT labels for pesticides. DOT labels often display the word "poison" prominently on shipping containers in order to alert people who handle them during shipping to the risks of doing so. DOT's use of the word "poison" is thus not tied to EPA's four toxicity categories but is meant to give explicit warning of the dangers if containers are punctured or leak. DOT's use of the word "poison" on labels is therefore a generalized warning covering a wide variety of substances; the rule's specificity is tied to shipping risks rather than to differentiation among kinds of toxic substances.

EPA pesticide labeling, on the other hand, is intended to inform users about products. EPA does not use the word "toxic" as a signal word. It uses it to differentiate levels of toxicity that have been established by laboratory tests and that are

grouped in four categories for which the signal words are "danger/poison," "warning," "caution," and "caution" (in descending order of toxicity). All labels carry directions for giving treatment in cases of accidental exposure, because even a product that DOT would not regard as needing a "poison" label for shipping purposes could cause harm in the event of an accident while the product is being used. EPA pesticide labeling tends to be very lengthy because most of it consists of directions for using the product, but this information is irrelevant to the shippers that DOT labels are intended for. In sum, EPA believes that there is no conflict here, since DOT and EPA labeling classifications serve equally legitimate but different purposes.

In assessing uses of the word "toxicity," OSHA believes that there has been conflict and overlap between agencies, but the problem has been greatly reduced. OSHA says it and other agencies are moving toward a consistent definition of the words "toxic" and "highly toxic."

DUPLICATE ENFORCEMENT

Example 35

Different sections of the Clean Air Act require reviews under one or more of five overlapping review programs that are not substantially different--(1) new source review under section 110 of the Act requires States' implementation plans to provide for review of proposed new sources of air pollution; (2) new source performance standards (NSPS) under section 111 of the Act require that certain defined kinds of air pollution sources meet standards designed to eliminate as much air pollution as possible; (3) national emission standards for hazardous air pollutants (NESHAP) under section 112 of the Act require that facilities that emit extremely hazardous pollutants meet certain standards; (4) prevention of significant deterioration (PSD) under part C of the Act requires that the best available control technology (BACT) be used by new sources of air pollution in areas that are already attaining the national ambient air quality standards; and, finally, (5) emissions offset review under part D of the Act establishes a system of review for new sources of air pollution in areas that are not meeting national ambient air quality standards, in order to insure that new sources will meet "lowest achievable emission rate" (LAER) standards.

EPA response

It is not quite correct to say that the programs that are specified in this example are not substantially different. The focus of review for new source performance standards and hazardous emission standards, for example, is inherently narrower than the focus of new source review for purposes of preventing significant deterioration in areas where standards have not been met. The concern for consistency between the programs is valid, however, and EPA is addressing it.

The existing PSD and nonattainment new source review provisions require that pollution sources meet emission limitations that are no less stringent than the limitations set by new source performance standards or NESHAP. Inconsistencies in the regulations arose because of the differences in the objectives of the programs. For example, the objective of PSD reviews is to restrain increases in emissions, while the objective of nonattainment reviews is to reduce emissions in order to achieve an ambient standard. Thus, regulatory differences such as those in the definitions of "source" result in a more stringent rule for nonattainment areas than for PSD areas. Moreover, the objectives of control technology review are theoretically more stringent for nonattainment areas than for PSD areas. Such variations in the regulations have led to claims that they are confused or inconsistent, claims that EPA recognizes and is analyzing to determine what may be done to simplify the process and improve understanding.

At the present time, EPA staff are evaluating alternative ways of integrating the several new source review elements of the Clean Air Act into a uniform review process. Developing a single, integrated program might involve standardizing definitions, developing a uniform approach to making control technology determinations, and perhaps emphasizing the effects of pollution sources rather than their locations. All sources might be examined for all the air quality concerns expressed in the various elements of the present Act. For example, in a single permit review, a source would be evaluated for the effect it has on ambient air quality as well as on "increment consumption" or "Class I area impact."

Example 36

EPA retains authority to issue water permits under the national pollutant discharge emission system (NPDES) and has not delegated it to Texas, but Texas issues permits under State water regulations. EPA and the State use different criteria. Therefore, companies have to observe State regulations based on water allocations that derive from regional quality requirements, Federal water effluent regulations, and regional EPA requirements based on the personal opinions of Federal officials in the regional offices. One company has had to negotiate permits with both EPA and the State agency. A costly amount of labor, travel, and other resources had to be used before the Federal EPA dropped its requirements.

EPA response

This example does not accurately state a problem. Of the 56 eligible States and territories (including the vast majority of the more industrialized States), 33 have been approved to administer and enforce the NPDES program within their borders. If a problem exists, it is not one of EPA unilaterally retaining NPDES authority. States that develop water discharge permit programs

meeting certain minimum requirements set out in EPA regulations will be approved. EPA encourages States to develop approvable NPDES programs and offers them technical and legal assistance to do so.

The example may be referring to situations in which a State has established a permit program that does not meet EPA requirements. In such cases, two permit programs could exist in one State--the Federal NPDES program (as required by the Clean Water Act) and the State's. When two programs exist concurrently, EPA seeks coordination with the State to the greatest extent possible, in order to minimize the effect of duplicate requirements on the regulated community. The example implies that companies may have to observe Federal EPA water effluent limitations that differ from regional EPA requirements, but this is incorrect.

Example 37

Both EPA and the States make inspections under both the Clean Air Act and the Clean Water Act. They inspect at different times and require that information be presented in different formats. This is costly to the companies and wastes regulatory resources.

EPA response

EPA has issued consolidated permit programs for the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the national pollutant discharge elimination system under the Clean Water Act, and underground injection control. The example might present a legitimate problem, but duplicate inspections are partially forced by the statutes. EPA's Office of Enforcement in a major study is examining an overall inspection scheme covering air, land, and water resources. The Office plans to develop an integrated national monitoring program with uniform procedures, and the program has high priority in fiscal year 1981.

Example 38

OSHA monitors State plans for 3 years before it accepts them. During that time, companies are subject to both Federal and State inspection and enforcement of OSHA standards.

OSHA response

State plans are monitored for no less than 3 years (29 CFR 1902). At the beginning of a State's program, full Federal enforcement is in order; as the State becomes more proficient, OSHA phases out segments of Federal inspections and begins to monitor in those areas instead. Both Federal and State OSHA inspections can occur at a job site only when a complaint has been filed with OSHA, which must investigate according to section 8(f) of the Occupational Safety and Health Act.

OSHA tries to coordinate inspection responsibilities with the States. Along with 23 State plans, there are 13 operational status agreements. Under a status agreement, OSHA will certify a State if it finds it proficient; after that, Federal enforcement is no longer required. Where there is concurrent jurisdiction, the State and OSHA share inspection information. Occasionally joint inspections are conducted even where there is no agreement.

Company comments

Duplicate inspections have occurred recently at plants in Indiana, Virginia, and Puerto Rico. Virginia's plan was approved in 1972, but OSHA inspections are still being conducted. Companies believe that OSHA inspections are conducted because it is dissatisfied with the State's enforcement.

Example 39

FDA is required by law to inspect medicated-feed plants at least once every 2 years. Company mills are being subjected to both Federal and State inspections. Each inspection requires 2-4 days of the plant manager's time, the work of one or two additional staff members, and about 2 additional staff days to prepare reports.

FDA response

FDA is attempting to reduce overlapping Federal and State inspections by contracting with States to perform inspections. Twenty-six States are currently working under such agreements. As a result, the States conducted 86 percent of all Federal inspections of feed mills in 1979. Duplication and regulatory conflict may occur in the 24 States that do not have contracts with FDA, but FDA has work agreements with some States that do not have contracts.

Company comments

FDA is trying to minimize duplicate inspections, but the problem still exists because there is some overlap in the allocation of feed mills between FDA and the States and duplicate inspections occur when FDA audits State inspections.

Example 40

EEOC and OFCCP both monitor Government contractors, and both request data about the same complaints. However, EEOC is responsible for allegations of discrimination because of sex, race, religion, and national origin, while OFCCP is responsible for enforcing affirmative action plans under Executive Order 11246.

EEOC response

Overlap was possible in the past, and duplicate reviews have occurred. Recently, EEOC and OFCCP have set clear lines of responsibility in a memo of understanding in which the agencies defer systemic investigations to one another in certain circumstances (46 F.R. 7435, January 23, 1981). Both agencies have authority to pursue allegations by individuals.

EEOC does not monitor employers' compliance with title VII's requirements in the same way that OFCCP monitors employers' compliance with the requirements of Executive Order 11246. By law EEOC must investigate all cases brought before it by individuals. OFCCP may refer individual cases to EEOC for investigation; the memorandum of understanding makes it clear that OFCCP will refer these cases to EEOC. EEOC and OFCCP both can and do coordinate the processing of systemic charges initiated by both agencies against the same employer (Civil Rights Act, sec. 707). 1/

Example 41

Water treatment systems required by section 402 of the Clean Water Act may contain hazardous wastes as defined by the Resource Conservation and Recovery Act. This results in multiple inspections by EPA separately under each act.

EPA response

The ultimate effect of regulations now being proposed for waste water treatment facilities is not completely known at this time. Therefore, with respect to permits, reporting requirements, and inspections, there may be some overlap between the two acts. EPA recognizes this potential and is taking steps to minimize it. For example, work is continuing on a consolidated permit program whose purpose is to reduce the number of permits issued for each facility. In addition, a rule EPA proposed on November 17, 1980, would eliminate the requirement to obtain an individual permit under the Resource Conservation and Recovery Act for all tanks that treat waste water and are also subject to an NPDES permit or to pretreatment regulations (45 F.R. 76074). Both efforts demonstrate EPA's desire to minimize regulatory overlap under the various acts.

1/In our report "Further Improvements Needed in EEOC Enforcement Activities," U.S. General Accounting Office, HRD-81-29, April 9, 1981, we recommended that the Director of OMB advise the President that the contract compliance function under Executive Order 11246 should be transferred from OFCCP to EEOC. We disagreed that a memorandum of understanding would eliminate the duplicate reviews.

Example 42

EPA has given approval to Missouri to administer the Clean Water Act, but it will not issue companies NPDES permits until the Federal and State agencies can agree on the contents of the permits. Business has been interrupted by repeated water sampling and analysis, meetings, and duplicate reporting and recordkeeping.

EPA response

This example does not accurately state a problem. On October 30, 1974, EPA approved Missouri's administration of the NPDES program. EPA does not, and under the Clean Water Act cannot, issue NPDES permits in Missouri except in limited circumstances. Primary responsibility for issuing NPDES permits rests with the State. EPA reviews and comments on some of the NPDES permits Missouri proposes to issue, and it maintains general assistance to the State's administration and enforcement of the NPDES program. Such activities are not likely, however, to result in the interruptions to business that are claimed in this example. In particular, duplicate reporting and recordkeeping would not be imposed as a result of EPA's involvement in a State program; all reporting and recordkeeping requirements are imposed by the State.

Example 43

California duplicates EPA's scientific reviews governing registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act. Registration of new pesticides is delayed in California.

EPA response

This example does not represent a problem of duplicate Federal and State regulatory requirements. Under section 24(a) of the amended Act, all States have authority to regulate the sale and use of federally registered pesticides within their own borders as long as their regulations do not permit pesticide sales or uses that are prohibited by the Act. This provision of the law thus leaves the States free to impose stricter regulations on pesticide sales and use than EPA imposes.

The Act does not prevent States from conducting their own pesticide registration programs. The authority to regulate the sale and use of pesticides implicitly includes authority to register pesticides, since registration is a central element of any effective regulatory scheme.

Furthermore, the legislative history of the Act as amended in 1972 shows that the Congress rejected preempting State registration authority and intended that Federal and State registra-

tion programs coexist, with the Federal registration requirements serving as a national "floor." State registration systems are useful and can complement the Federal registration program by focusing on issues that are relatively more important at the State level and by bringing new ideas and fresh approaches to EPA's attention.

EPA supports partnership between Federal and State Governments in a national pesticide registration program while agreeing that duplication of effort should be avoided. In conducting their registration programs, States may review pertinent scientific data, but this does not necessarily constitute a simple duplication of Federal reviews. Each State approaches existing data with its own priorities, needs, and goals. State regulatory conclusions may thus differ--they may be more stringent, for example--from Federal registration decisions, even though both may be based on the same data.

EPA cannot comment on the length of time California requires to reach its own product registration decisions. The State itself would be the best qualified to address this concern.

Company comments

The facts EPA responds with are correct, and States do have the right to complement EPA's standards. Wholesale re-review of data already reviewed and judged acceptable by EPA is questionable, however.

Example 44

In 1974, Indiana established regulations for controlling hydrocarbon emissions and EPA approved them. In 1975, Indiana exempted ethyl alcohol from these regulations. In 1978, EPA ruled the exemption invalid and cited a company in Indiana for ethyl alcohol emissions.

EPA response

This example does not accurately reflect a chain of events between 1972 and 1979. It misrepresents facts and omits key events that explain the conflict in the regulations that the example is concerned with. The facts are that on January 31, 1972, Indiana submitted to the EPA Administrator an implementation plan pursuant to section 110 of the Clean Air Act. The Administrator approved the plan on May 31, 1972, with several exceptions (37 F.R. 10842). Included in the plan was Indiana's State regulation APC-15, which concerned the control of hydrocarbon emissions from stationary sources; the regulation was amended and approved by the Administrator on May 14, 1973 (38 F.R. 12698).

In 1974, after public notice and hearing, Indiana adopted further revisions to regulation APC-15 to modify the type of

hydrocarbon subject to control by exempting certain solvent mixtures, including ethyl alcohol. On November 8, 1974, Indiana submitted the revised rule to EPA. EPA disputed the contention that exempting certain solvents would not result in an increase in ambient oxidant levels. Accordingly, on May 6, 1976, EPA disapproved the revisions to APC-15 because they did not "assure the attainment and maintenance of the National Ambient Air Quality Standard for photochemical oxidants" (41 F.R. 18654).

In doing this, EPA established that the 1972 regulations were still in effect. In 1978 and 1979, EPA initiated enforcement actions against companies that were not controlling hydrocarbon emissions from the solvents in question. It can be seen from these events that EPA's actions were not contrary to Indiana's regulations, despite what is claimed in the example.

Example 45

Under sections 506 and 507 of the Federal Food, Drug, and Cosmetic Act, FDA certifies all antibiotics and insulin products for human use. An excessive number of certification "checks" is required, since the manufacturers are required to make complete tests, in some cases FDA has already certified bulk material going into the finished product, and FDA also conducts post-certification inspections.

FDA response

There is duplication but this is normal where products are subject to government tests. (FDA proposed a few years ago to substitute data submission by industry for its own testing; the idea was poorly received by industry.) At the same time, FDA is taking steps to eliminate certification entirely for particular products that may no longer require it. However, the law still requires some FDA certification. It is needed to some extent because of the possibility of error in manufacturer testing (although this is uncommon). FDA certification of bulk materials clearly should continue. Certain chemical tests are more difficult after processing and, therefore, are not considered as duplication. Furthermore, FDA conducts post-certification inspections only rarely and randomly, to insure that the quality of a product's storage and shelf life. Because each of these checks involves a different stage, there is no duplication.

Provisions to exempt companies from the initial certification and testing program were added to the Federal Food, Drug, and Cosmetic Act in 1962 but, until recently, they have been used sparingly product by product and firm by firm. FDA is now implementing various class exemptions.

Company comments

Proven, successful manufacturers of brand line items should be granted certification exemptions, as provided for in the law.

More and faster exemptions from the certification requirement should be granted, and better information should be made available about the costs of certification.

Example 46

To modify and relocate blast machines, downdraft tables, and grinding belts and to install a new boiler, a company in Virginia applied for a PSD permit as required by the Clean Air Act, and the State provided public participation opportunities on the company's plan. About 4 months later, EPA repeated public participation opportunities--that is, public notice, 30-day public comment period, chance for public hearing, and so on. The company estimated that the delay caused by EPA's duplication was about 2 months and cost the company between \$180,000 and \$300,000.

EPA response

Virginia law requires industry to apply to the State for PSD permits. After public hearings, the State applied to EPA for a permit. EPA also holds a public participation period. This example might present a legitimate concern but the duplication arises from State requirements. EPA has no authority to change State laws.

Company comments

EPA's response is not completely accurate because EPA could have waived the requirement for Federal participation.

Example 47

A discrimination complaint can be filed with more than one agency--for example, local human relations councils, State civil rights commissions, EEOC, and Federal courts--and a decision by one agency is not binding on any other. Complainants charged they were not hired because they had instigated litigation over companies' spouse rules. The State investigated and then dismissed the charges. EEOC rejected the State's findings and notified the companies that it would conduct its own investigation.

This is possible but becoming more unlikely because of recent work-sharing agreements with a number of States under which EEOC contracts out some of its work. Pursuant to its statute, EEOC must review and grant substantial weight to State findings that are in accord with title VII. In 95 percent of the cases, EEOC does thus grant substantial weight to State findings and does not pursue its investigation.

EEOC is attempting better coordination with State and local fair employment practices commissions. It has also begun to observe a new and comprehensive memorandum of understanding with the Department of Labor's Office of Contract Compliance Programs (OFCCP) (45 F.R. 7435, January 23, 1981) aimed at minimizing

duplicate investigations by permitting OFCCP to send individual complaints to EEOC for processing under title VII. Additionally, EEOC and the Department of Justice have jointly published for comment a notice of proposed rulemaking that would permit other Federal agencies to send individual employment discrimination complaints to EEOC for processing (45 F.R. 22395, April 17, 1981).

Company comments

EEOC usually reviews State "no probable cause" findings. This is needless duplication because dissatisfied complainants also have recourse to court review.

Example 48

Utah has not been authorized to administer programs for controlling air emission sources under the Clean Air Act. A permit application must be submitted to both EPA and the Utah Division of Environmental Health.

EPA response

Without additional information, this example does not present a legitimate problem. Utah currently has responsibility for new source review programs, while EPA retains authority over PSD programs. Utah is in the process of revising its new source review program and adopting a PSD program.

Company comments

EPA and the State appear to be moving in the right direction.

Example 49

Both EPA and States have licensing authority for the discharge of cooling water from plants into rivers, and the words and conditions for discharge are identical in both.

EPA response

Without more information, this example does not state a problem. There is no mention of increased costs or other harm caused by Federal and State licensing authorities.

Company comments

The company providing the example did not provide additional details.

Example 50

Employees demoted for unsatisfactory work performance may file charges with the National Labor Relations Board, claiming

discrimination because of union activities, and failing to win the case may then file charges with EEOC, citing race discrimination as the cause of demotion. There are many problems and costs in thus defending a company's position that an employee has been demoted because of unsatisfactory work performance.

EEOC response

This type of situation is possible only in a very small number of cases that arise when two separate legal authorities confer two separate causes of action. The National Labor Relations Act does prohibit discrimination because of union activities and title VII does prohibit discrimination because of race. EEOC cannot foreclose its involvement in these cases because it is obligated by law to investigate all title VII cases that individuals file with it.

Example 51

Companies are subject to duplication of authority by EPA and States in applying for hazardous waste permits under the Resource Conservation and Recovery Act.

EPA response

The statement is unsubstantiated as the following points illustrate. Section 3006 of the Act authorizes States to operate hazardous waste permit programs instead of EPA, upon approval by EPA's Administrator. This delegation of authority is embodied in EPA's Consolidated Permit Regulations, promulgated May 19, 1980. These regulations establish procedures for permit decisionmaking for the hazardous waste management program under this Act as well as for the underground injection program under the Safe Drinking Water Act, the Section 404 program and the national pollutant discharge elimination system under the Clean Water Act, and the prevention of significant deterioration program under the Clean Air Act.

Promulgating these regulations was an important step toward consolidating and unifying procedures and requirements for environmental permit programs. With few exceptions, most aspects of the new regulations apply both to EPA programs and to State programs that receive EPA approval to operate in place of a Federal program. The common requirements are intended to insure that State-administered permit programs satisfy minimum statutory objectives while at the same time recognizing the differences among State legal authorities, procedures, and management philosophies. The regulations are also intended to simplify States' tasks in administering multiple programs by improving coordination between EPA and States when administration of all five EPA permit programs has not yet been delegated to State agencies.

Consequently, facilities that treat, store, or dispose of hazardous wastes are covered directly by State statutes and

regulations in States with a program that EPA has authorized. A permit issued by an authorized State will satisfy the Federal requirement. EPA administers permit programs only in States unable to meet authorization criteria.

According to section 3009 of the Resource Conservation and Recovery Act, States may not administer hazardous waste programs less stringent than required by the Act. Section 3006(c) reads: "Any State which has in existence a hazardous waste management program pursuant to State law before the date 90 days after promulgation of regulations under [section] 3002, 3003, 3004 and 3005 may" request authorization. Therefore, EPA must give to States that are developing or have in place hazardous waste programs time enough to bring them into conformity with Federal requirements under the Act.

Before the Act was passed, no one State had a permit program for hazardous waste facilities that incorporated all the requirements present in the Act. About 4 States had limited solid or hazardous permit programs, and EPA studied these before proposing its regulations. In 1977-78, work groups to develop the initial Section 3006 permit regulations included representatives from California, Illinois, Missouri, and Texas. Between proposal and final promulgation, in August 1980, the EPA Deputy Administrator requested each State governor and solid waste agency chief to comment on their States' experiences, for consideration in writing the final EPA Consolidated Permit Regulations.

Example 52

Occupational safety and health are administered in Indiana by the Indiana Department of Labor and monitored by OSHA. The OSHA Administrator (an Assistant Secretary in the U.S. Department of Labor) contends that the State's administration is deficient and must be replaced by the Federal program. This doubles inspection and administration time, doubles taxpayers' costs, and doubles executive time for interviews and inspections and clerical time for processing responses.

OSHA response

29 CFR 1902.47 states that "the Assistant Secretary may at any time reconsider on his own initiative or on the petition of an interested person his decision granting an affirmative determination" about a State plan. When OSHA found the Indiana plan deficient, AFL-CIO filed petitions to withdraw it. No operational agreement presently exists between OSHA and Indiana, and the State no longer has a qualified State plan. By law, OSHA must afford full enforcement in the State (monitoring and inspections) even if this overlaps with inspections conducted by the unapproved State agency.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUN 19 1981

Mr. William J. Anderson
Director, General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

We have reviewed the GAO's draft report on overlapping and conflicting regulations. It concludes that, contrary to the oft-heard criticism, conflicting and overlapping regulations are not a major problem. While I find this major conclusion persuasive, I also agree with the authors' conclusion that further improvements in our efforts to eliminate conflicting and overlapping regulations are possible.

The report recommends that in implementing E.O. 12291, the Director, in cooperation with the Task Force on Regulatory Relief, should:

- o Require agencies to include effects associated with interacting regulatory requirements in the regulatory impact analyses.
- o Continue to use special studies of selected industries to identify and mediate problems of regulatory conflict and overlap.
- o Identify statutory impediments and recommend legislative changes when necessary to allow agencies to work together.
- o Require that regulatory agencies review related rules concurrently.
- o Require agencies to involve State and local regulatory authorities early in the review of regulations.

I basically agree with these recommendations.

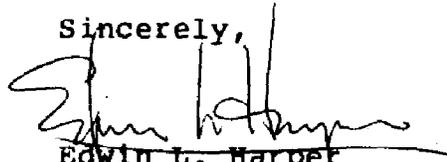
We have, however, the following comments on the draft report:

- o GAO does not fully discuss the potential of the Paperwork Reduction Act of 1980 (P.L. 96-511). Under the Act, OMB will review regulations and their recordkeeping and reporting requirements. The Act also requires OMB to create a Federal Information Locator System (FILS) which would contain information collected by various government agencies. Once completed, FILS would help agencies eliminate overlapping and duplicative information collection activities.

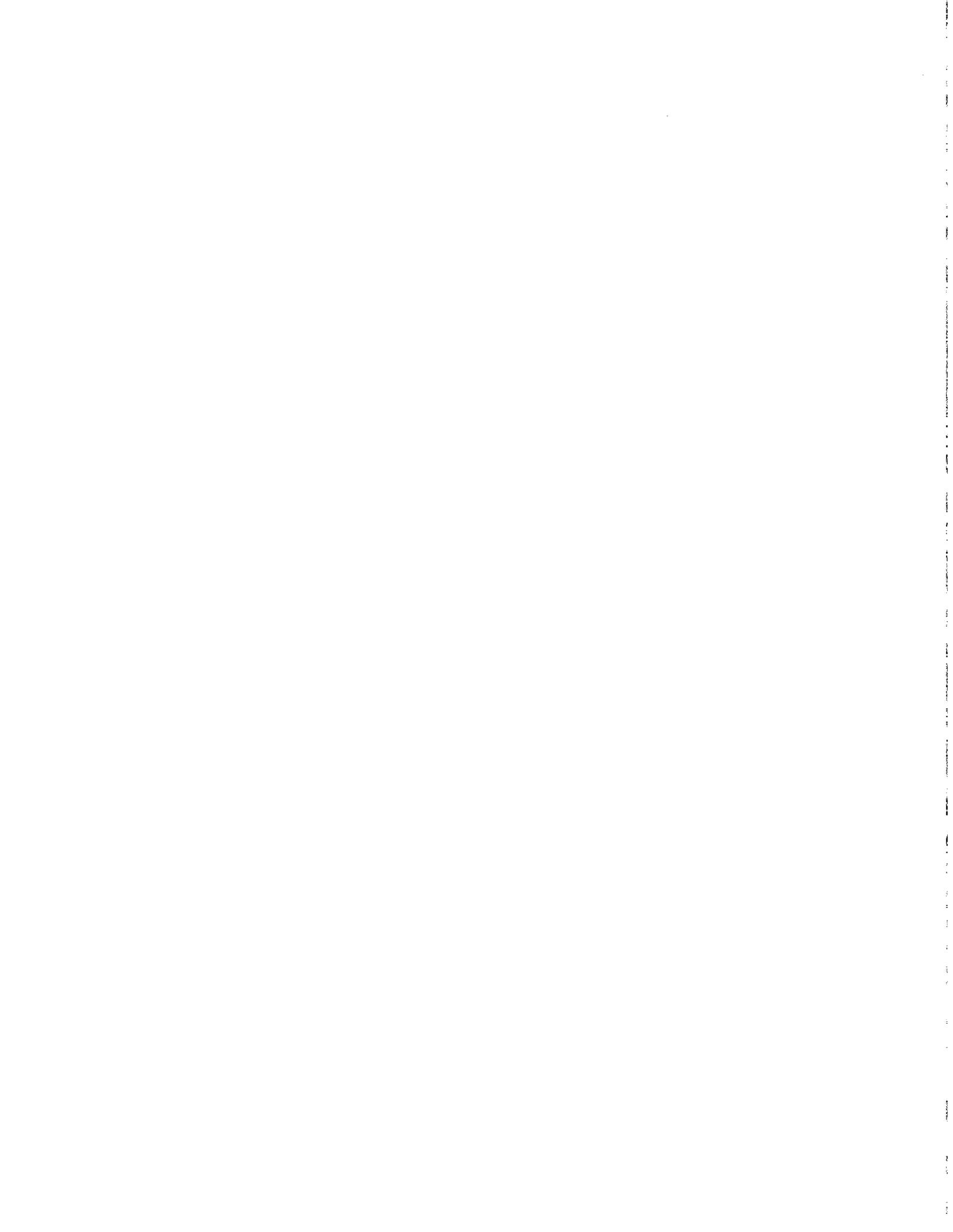
- o GAO only briefly refers to the Regulatory Flexibility Act (P.L. 96-354), including the Act's potential for identifying duplicative and overlapping regulations. However, it should also note that the Office of Advocacy, Small Business Administration, is planning to issue guidance on how to prepare Regulatory Flexibility Analysis and monitor compliance. Additionally, OMB will review such analyses when they accompany regulations submitted under E.O. 12291 and keep a close watch over conflicting and overlapping regulations.
- o GAO might well want to discuss in more detail the ongoing work of the Presidential Task Force on Regulatory Relief in identifying existing regulations for review. Vice President Bush announced the first installment of 27 regulations on March 25th. In addition, various agencies have independently undertaken efforts to review existing regulatory programs. It is our understanding that these reviews will include an assessment of the regulatory requirements and efforts to reduce unnecessary and duplicative regulations.

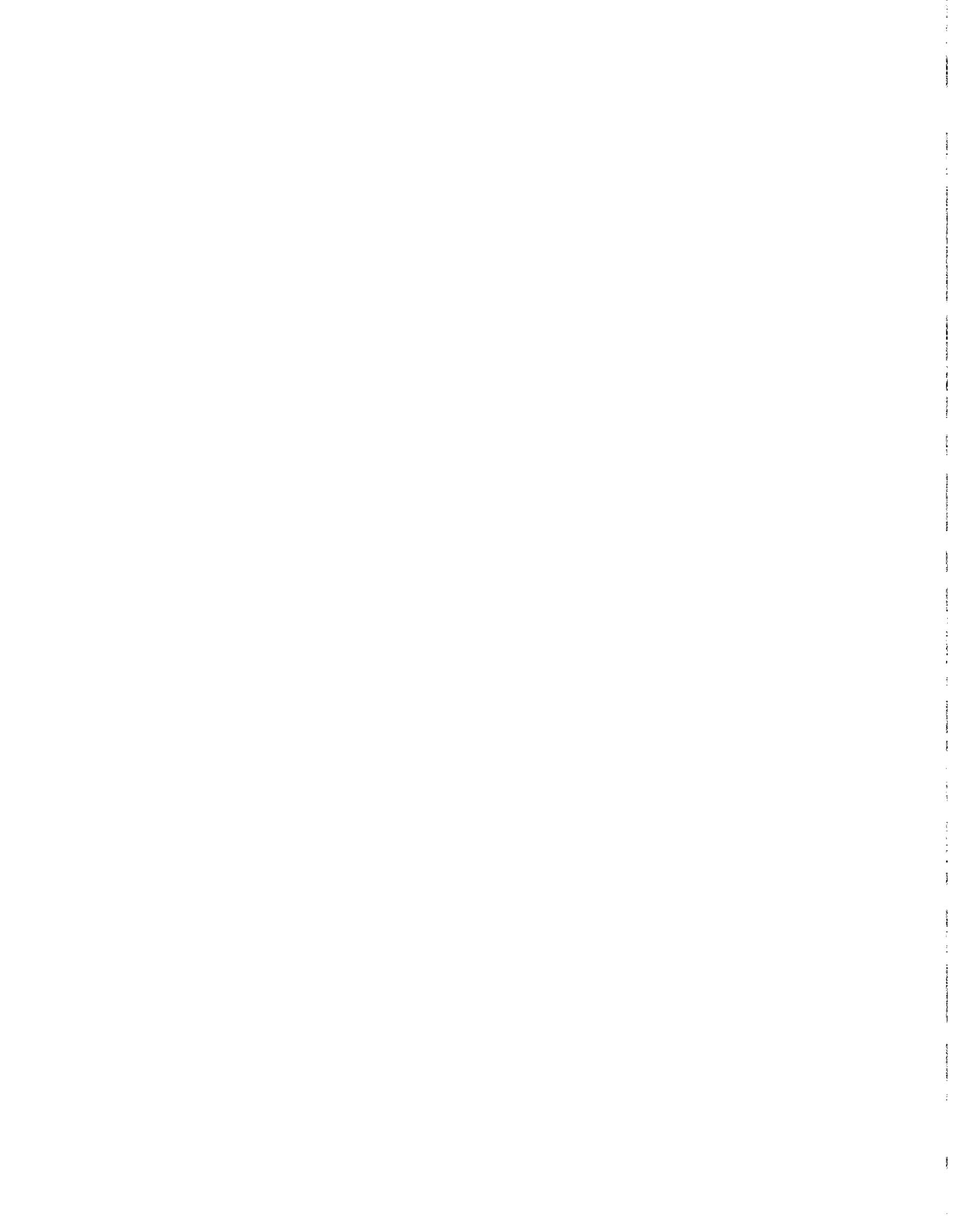
Thank you for the opportunity to comment on the draft report.

Sincerely,



Edwin L. Harpel
Deputy Director





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